TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 201.

ARCHIE J. McLAREN, ADMINISTRATOR OF THE ESTATE OF JOHN McLAREN, DECEASED, PETITIONER,

vs.

L. G. FLEISCHER.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

PETITION FOR CERTIORARI FILED MARCH 30, 1905.

CERTIORARI AND RETURN FILED JUNE 14, 1905.

(27,556)

(27,586)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 291.

ARCHIE J. McLAREN, ADMINISTRATOR OF THE ESTATE OF JOHN McLAREN, DECEASED, PETITIONER,

vs.

L. G. FLEISCHER.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript of record from the superior court of Riverside County	1	1
Complaint	1	1
Demurrer to complaint	5	3
Order sustaining demurrer	7	4
First amended complaint	7	4
Demurrer to first amended complaint	12	7
Order sustaining demurrer	14	8
Second amended complaint	14	8
Demurrer to second amended complaint	26	14
Order sustaining demurrer	27	14
Judgment	27	15
Certificate to judgment roll	29	16
Notice of appeal	30	16
Affidavit of service by mail	31	16
Clerk's certificate	32	17
Order of submission	34	17
Order of substitution	34	18
Order to file additional briefs	34	18
Entry of submission	34	18
Judgment	35	19
Order denying rehearing	35	19
Opinion, Lawlor, J	36	20
Clerk's certificates	46	26
Writ of certiorari and return	48	27

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 10, 1920.

a In the Supreme Court of the State of California.

L. A. No. 4736.

JOHN MCLAREN, Plaintiff and Appellant,

vs.

L. G. FLEISCHER, Defendant and Respondent.

From the Superior Court of Riverside County.

Transcript on Appeal.

Henry M. Willis, San Bernardino, California; J. O. Phillips, Blythe, California, Attorneys for Plaintiff and Appellant.
Duke Stone, Los Angeles, California, Attorney for Defendant and Respondent.

Filed April 27th, 1916. B. Grant Taylor, Clerk, by Erb, Deputy Clerk.

1 In the Supreme Court of the State of California in and for the County of Riverside.

JOHN MCLAREN, Plaintiff,

vs.

L. G. FLEISCHER, Defendant.

Complaint.

John McLaren, plaintiff in the above entitled action, complaining of defendant herein, alleges:

I.

That on the 17th day of April, 1910, the southwest one-quarter of section 12, township 7 south, range 22 east, San Bernardino
2 base and meridian, was unappropriated public lands of the United States, but withdrawn from entry, selection or any form of appropriation.
That the above described lands are located in the County of Riverside, State of California.

II.

That on April 18th, 1910, the said lands were released from such withdrawal from entry to the extent of permitting the establishment of settlement rights under the provisions of the general land laws of

the United States, and in accordance therewith on said date, plaintiff herein duly entered said lands and made settlement thereon according to the provisions of the general land laws relating thereto, and erected a house thereon, and cleared and improved parts of said lands.

III.

That on May 18th, 1910, said lands were thrown open for entry, and plaintiff duly made application to enter thereon under the homestead laws of the United States, and paid the land office fees required for such entry, and received a receipt therefor from the land office.

IV.

That plaintiff continued to reside continually upon said premises until dispossessed therefrom by law, by said defendant.

3 V.

That on said May 18th, 1910, defendant herein made application for entry upon said lands, claiming prior right thereunto, and that the land department, by reason of said claim of prior right, granted to said defendant entry to said lands, and cancelled plaintiff's application.

VI.

That plaintiff is informed and believes, and upon such information and belief alleges, that his application to enter said premises was rejected through fraud and misconception or wilful disregard of the law on the part of the officers of the land department, and that the officers of the land department erred in granting entry of said premises to defendant.

VII.

That plaintiff contested the entry of said defendant to said premises, but the land department, overruling plaintiff's contests and protests, recognized the entry of said defendant, and granted to defendant, patent to said premises.

VIII.

That plaintiff is informed and believes, and upon such information alleges, that by reason of the fraud and misconception or wilful disregard of the law on the part of the officers of the land department, as aforesaid, that the issuing of the patent to said defendant was illegal and could convey no title to defendant, but that title to said lands should be declared to be vested in plaintiff.

4

Wherefore, plaintiff prays that title to said lands declared to be vested in plaintiff herein, and that the patent issued by the land de-

partment to said defendant, be declared held in trust for use and benefit of said plaintiff, and that defendant pay to said plaintiff a reasonable rental for use of said premises, and for costs of this action, and for such other and further relief as to the court may seem just and proper.

JOHN McLAREN,
Plaintiff.
J. O. PHILLIPS,
Attorney for Plaintiff.

Duly verified.
Filed Aug. 28, 1915.
[SEAL.]
A. B. PILCH,
Clerk.

Affidavit of Service by Mail.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Duke Stone, being first duly sworn, states: That on September 17th, 1915, he enclosed a true copy of the attached Demurrer in an envelope addressed to J. O. Phillips, Attorney, Blythe, Riverside County, California, and placed the necessary postage upon said envelope and sealed the same, and then mailed the said envelope addressed to said J. O. Phillips, by then and there depositing it in the United States mails at Los Angeles, California, on this September 17th, 1915.

That this affiant is the Attorney for Defendant in the cause described within the attached demurrer, and has his office at Los Angeles, California; that the residence and office of the said J. O. Phillips, who is Attorney for Plaintiff in said cause, is at said town of Blythe, Riverside County, California.

DUKE STONE.

Subscribed and sworn to before me this 17th day of September, 1915.
[SEAL.]
CHARLES F. REICHE,
Notary Public in and for Los Angeles County, California.

[Title of Court and Cause.]

Demurrer.

Comes now the defendant in the above entitled cause and demurs to the plaintiff's complaint filed therein, upon the following grounds:

I.

Said complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

II.

That paragraph Six thereof is uncertain in this: that it does not appear therefrom in what the fraud or disregard of the law on the part of the officers of the land department consisted, and it does not appear what officers the plaintiff charges with fraud and disregard of the law; and it does not appear how, or in what manner the officers of the land department erred in granting entry of said premises to the defendant.

III.

That paragraph Eight of said complaint is uncertain in this: that it does not appear therefrom what the fraud or misconception or wilful disregard of the law consisted in, nor does it appear what officers of the department were guilty of the alleged fraud; nor does it appear in what matter the issuing of the patent to the defendant was illegal; nor does it appear in what manner, or for what reason; the said patent could convey no title to the defendant.

IV.

That said paragraphs Six and Eight of the plaintiff's complaint are ambiguous for the same reasons, that they are uncertain.

7 Wherefore, defendant prays the judgment of the Court sustaining this demurrer.

DUKE STONE,
Attorney for Defendant

Filed Sept. 18, 1915. [Seal.] A. B. Pilch, Clerk, by O. A. Lowentrout, Deputy.

Minute Order.

Oct. 11, 1915.

Demurrer sustained 10 days. (Minute book 32 page 6.)

[Title of Court and Cause.]

First Amended Complaint.

John McLaren, plaintiff in the above entitled action, complaining of defendant herein, alleges:

I.

That on or about the 17th day of April, 1910, the southeast one-quarter (S. E. ¼) of section twelve (12), township seven (7) south, range twenty-two (22) east, S. B. M., was unappropriated public land of the United States, but withdrawn from entry, selection or

any form of appropriation by order of the land department
8 of the United States, first, by withdrawal dated July 17, 1902.
and by a second withdrawal dated September 12, 1903, which said withdrawal continued in force and effect up to the 18th day of April, 1910.

II.

That the said lands above described are located in the County of Riverside, State of California.

III.

That on April 18, 1910, the said lands were released from such withdrawal from entry as hereinbefore mentioned to the extent of permitting the establishment of settlement rights under the provisions of the General Land Laws of the United States, and in accordance therewith, on said date, plaintiff herein duly entered said lands and made settlement thereon according to the provisions of the General Land Laws of the United States relating thereto, and erected a house thereon and cleared and improved parts of said lands.

IV.

That on May 18, 1910, said lands were thrown open for entry under the General Land Laws of the United States, and plaintiff duly made application to enter thereon and paid the land office fee as required by law for such entry, and received a receipt therefor from
the land office officials having jurisdiction of the disposition
9 of the said lands, which office is located in Los Angeles.

V.

That the plaintiff continued to reside continuously upon said premises until dispossessed therefrom by law, through the instigation of said defendant.

VI.

That on or about the 14th day of July, 1908, and while the said lands were withdrawn from entry, selection or any form of appropriation as designated by the withdrawal order of September 12, 1903, as hereinbefore mentioned, said defendant herein contested a homestead entry which had been filed by CharlesW. Rider on the premises hereinbefore described, which contest was allowed by the land office officials having jurisdiction thereof, and a preference right granted to said defendant by reason of said contest.

VII.

That on or about the said date of April 18, 1910, defendant herein made application for homestead entry for said premises and

claimed a preference right thereto by reason of the aforesaid contest, and said entry was accepted by the land officials and patent granted to said defendant for said premises on or about January 15, 1915.

10

VIII.

That plaintiff's application to make entry upon said premises was rejected by the United States Land Officials without a hearing, said rejection being made for the reason that the registrar and receiver having jurisdiction thereof decided that said defendant was entitled to entry by reason of the contest initiated by him as hereinbefore stated and had a preference right thereto over plaintiff by reason of said contest.

IX.

That plaintiff appealed from said decision of the registrar and receiver to the land commissioner and to the secretary of the interior, but that the appeal was denied and the findings of the registrar and receiver were confirmed.

X.

That plaintiff is informed and believes, and upon such information and belief alleges, that the registrar and receiver, and others to whom the appeal was carried, rejected plaintiff's application for entry on said premises through misconception or wilful disregard of the United States Land Laws relating thereto, for the following reasons, to-wit:

First. That said officials misapplied or disregarded the United States Land Laws and regulations, permitting defendant to contest the said former entry of Charles W. Rider while the lands
11 were withdrawn by the various withdrawal orders hereinbefore mentioned;

Second. That the said Land Office Officials misapplied or disregarded the law in allowing, or keeping alive, the preference right granted to said defendant by his successful contest beyond the period and time specified and designated in the United States Land Laws relating thereto;

Third. That the said registrar and Receiver and other officials to whom the matter was appealed misapplied or wilfully disregarded the general land laws relating to homestead entries on public lands of the United States in granting to said defendant the entry to said lands and the rejection of plaintiff's entry by reason of said preference right.

XI.

That plaintiff is informed and believes, and upon such information and belief alleges, that by reason of the misconception, or dis-

regard, of the United States Land Laws on the part of the officials of the land department as aforesaid, that the issuing of the patent to said defendant was illegal and could convey no title to defendant, and that by reason of plaintiff's application to make entry upon the aforesaid lands, which was rejected as aforesaid by the United States Land Office Officials, plaintiff herein is entitled to the possession of said premises and that same should be declared to be vested in plaintiff.

12 Wherefore, plaintiff prays that title to said lands be declared to be vested in said John McLaren, plaintiff herein, and that the patent issued by said land department to said defendant be declared held in trust for the use and benefit of said plaintiff, and that defendant pay to said plaintiff a reasonable rental for the use of said premises, and for costs of this action, and for such other and further relief as to the Court may seem just and proper.

JOHN McLAREN,
Plaintiff.
J. O. PHILLIPS,
Attorney for Plaintiff.

Duly verified.

Filed Nov. 18, 1915. A. B. Pilch, Clerk, by E. B. Harris, Deputy.

[Title of Court and Cause.]

Demurrer to First Amended Complaint.

Comes now the defendant in the above entitled cause and demurs to plaintiff's complaint therein, upon the following ground:
13 That said complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

DUKE STONE,
Attorney for Defendant.

Affidavit of Service by Mail.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Duke Stone, Esq., being first duly sworn, states: that on November 22nd, 1915, he enclosed a true copy of the attached demurrer in an envelope addressed to Mr. J. O. Phillips, Attorney-at-Law, Blythe, Riverside County, California, and placed the necessary postage upon said envelope and sealed the same, and then mailed the said enevlope addressed to said J. O. Phillips, by then and there depositing it in the United States mails at Los Angeles, California, on this 22nd day of November 1915.

That this affiant is the attorney for the defendant in the cause described within the attached demurrer, and has his office at Los Angeles, California; that the residence and office of the said J. O. Phillips, who is attorney for plaintiff in said cause, is at said town of Blythe, Riverside County, California.

DUKE STONE.

14 Subscribed and sworn to before me this 22nd day of November, 1915.

[SEAL.]

H. E. WASSELL,
Notary Public in and for Los Angeles County, California.

Filed Nov. 23, 1915. A. B. Pilch, Clerk, by O. A. Lowentrout, Deputy.

Minute Order.

December 13, 1915.

Minute Book 32, page 213. Demurrer Sustained, 15 days to amend.

[SEAL.]

A. B. PILCH,
Clerk,
By O. A. LOWENTROUT,
Deputy.

[Title of Cause.]

Second Amended Complaint.

Comes now plaintiff in the above entitled action, in this second amended complaint, and complaining of the defendant herein alleges:

15 I.

That the said plaintiff, is, and at all times mentioned herein, has been a citizen of the United States, over the age of twenty-one years, and is, now, and has been at all times mentioned herein, qualified under the laws of the United States, to make and perfect a homestead entry upon public lands of the United States, under the land laws of the United States.

II.

That on February 9th, 1903, and for a long time prior thereto, the S. E.¼ of Sec. 12, T. 7, S., R. 22 E., S. B. M., situate in the County of Riverside, State of California, was among other lands in the same neighborhood, open to entry under the land laws of the United States.

III.

That on February 9th, 1903, one Charles W. Rider, duly made his homestead entry in the United States Land Office, at Los Angeles, California, on said S. E¼ of said Sec. 12, under the homestead laws of the United States; said Land Office then and at all times hereinafter mentioned, being the United States Land Office having jurisdiction over said lands as provided by law.

IV.

That on or about the 8th day of September, 1903, the said lands, together with other lands in the neighborhood thereof, were
16 duly withdrawn, by order of the Land Department of the United States, under and by virtue of an act of Congress approved June 17th, 1902, and known as and called the "Reclamation Act," from all forms of entry, said withdrawal being what is commonly known as and called, and designated by the Land Department of the United States as, a "First Form Withdrawal"; and that said lands remained so withdrawn under said "First Form Withdrawal," until restored as hereinafter mentioned. That lands so withdrawn under said "First Form Withdrawal" under said act of June 17th, 1902, cannot, under the terms and provisions of said Act, be entered, selected or located in any manner as long as the said lands so remain withdrawn.

V.

That on February 18th, 1908, and while said lands were so withdrawn, one Lawrence G. Fleischer, defendant herein, filed a contest against the said homestead entry of the said Charles W. Rider, on the said lands hereinbefore described, under and by virtue of the laws of the United States, and the rules and regulations of the Land Department, and subject to the act of Congress of May 14th, 1880, which said contest was recognized by the Land Department of the United States; that the register and receiver of the Local Land Office of the United States, at Los Angeles, California, entertained said contest, and sustained the same in
17 favor of said defendant, and made its report in due form to the Commissioner of the General Land Office, recommending a cancellation of said entry; that on January 28th, 1909, the then Commissioner of the General Land Office sustained the decision of the register and receiver of the said Local Land Office, and canceled the said homestead entry of the said Charles W. Rider, and directed the said register and receiver to advise all parties in interest; that thereafter to-wit, on February 11th, 1909, the register and receiver of the Local Land Office, at Los Angeles, California, duly notified said defendant, Lawrence G. Fleischer, of the cancellation of said entry; and at the same time notified him that he had been awarded a preference right to enter upon the said

S. E.¼ of Sec. 12, T. 7 S., R. 22 E., S. B. M., within thirty days after the said land had been restored to public entry.

VI.

That thereafter, to-wit, by an order duly made by the Secretary of the Interior of the United States, to-wit on January 10th, 1910, said lands together with other lands in the neighborhood thereof, were restored to public settlement on April 18, 1910, and to public entry on May 18, 1910.

VII.

That on April 18, 1910, plaintiff herein, being then and there duly qualified under the land laws of the United States
18 to make settlement and to make a homestead entry on open public lands of the United States, made actual settlement on the said S. E.¼ of Sec. 12, T. 7 S., R. 22 E., S. B. M., in Riverside County, California, said lands being a part of the lands so restored as hereinbefore alleged, with the intention of claiming the same under the homestead laws of the United States; that plaintiff thereby acquired a settler's right under and by virtue of the Act of Congress of May 14, 1880, relating to a settler's right; that he remained thereon as such settler, and made his residence thereon, under and by virtue of the laws of the United States, and on May 18, 1910, duly made entry thereon, by filing his homestead application, as such settler, in the United States Land Office, at Los Angeles, California, and paying the fees required by law, and in all respects complied with the laws and rules and regulations of the land department, relating to homestead entries, and continued to reside thereon with his family, and make improvements thereon, until dispossessed by said defendant, by a judgment duly made and given in the Superior Court of the State of California in and for Riverside County and entered April 24, 1915

VIII.

That on May 18, 1910, but subsequent to the entry of plaintiff, said defendant Lawrence G. Fleischer made his homestead entry on the same land in the United States Land Office, at Los Angeles, California, claiming a preference right so to do, under and
19 by virtue of said alleged preference right theretofore awarded him by the register and receiver of the Local Land Office of the United States, at Los Angeles, upon the successful termination of said contest against the entry of said Charles W. Rider.

IX.

That on May 18, 1910, all of said applications to enter, and all said entries, were duly suspended by the land department of the United States, pending the settlement of a contest between the State

of California and the United States of America, as to the character and disposition of said land; that on May 22, 1912 by an order duly made and entered said lands were again restored to public entry, subject to the entries already made thereon.

X.

That thereupon, on June 3, 1912, without hearing and without evidence, and arbitrarily, the register and receiver of the Land Office, at Los Angeles, California, rejected and cancelled the homestead entry of plaintiff, and allowed the homestead entry of defendant, on the sole ground that the said defendant had acquired a preference right under the laws of the United States, by reason of the successful termination of the contest theretofore filed and concluded by him as hereinbefore alleged.

20 XI.

That thereafter plaintiff adopted, used, and exhausted all remedies provided by the laws of the United States, and the rules and regulations of the Land Department of the United States, concerning appeals, and the exercise of supervisory authority, in order to secure his said right as a settler, and as a homestead entryman on said lands, under and by virtue of said settlement and homestead application, but that the officers of the Land Department of the United States refused, and still refuse, to allow him the right he acquired under and by virtue of his settlement on said land as hereinbefore alleged, and his entry thereon under the homestead laws of the United States as hereinbefore alleged; that plaintiff was, at the time of said application, and ever since has been, and still is, duly qualified to make and perfect such homestead entry, and to make such settlement and perfect the right vested in him thereby granted by law; that by reason of, and through the action and decisions of the officers of the Land Department of the United States, the said entry of plaintiff has been cancelled and denied, and the said entry of the said defendant has been allowed and approved, and a patent was, on January 15, 1915, issued by the President of the United States to the said Lawrence G. Fleischer for the said lands, which said patent was recorded in the office of the County Recorder of Riverside County on April 27, 1915, in Book 6 of Patents at page 375, all as a result of the said action and decisions of the officers of the Land Department of the United
21 States, and not otherwise.

XII.

And plaintiff further alleges that he is informed and believes and upon such information and belief alleges that the officers of the Land Department of the United States, to-wit, the then register and receiver of the Local Land Office, at Los Angeles, California, who received, recognized, and entertained the contest of the said defendant,

Lawrence G. Fleischer, against the former homestead entry of the said Charles W. Rider, as aforesaid, and who, after hearing said contest, recommended to the Commissioner of the General Land Office, that the said entry be cancelled; and that the then Commissioner of the General Land Office who considered said contest, and the recommendation of the register and receiver, aforesaid, and cancelled said entry of the Charles W. Rider as aforesaid, and directed said register and receiver of said Local United States Land Office at Los Angeles, California, to advise all parties in interest in said contest, acted wrongfully and contrary to the law, by and through a misconstruction and mistake in the application of the laws of the United States, relative to contests against entries on public lands, and the laws of the United States, relative to the acquiring of a preference right by reason of such contest, particularly contrary to the express terms of the Act of Congress of May 14, 1880, wherein and whereby a preference
22 right is declared and created under and by virtue of and subject to the terms of said Act.

XIII.

That the said then register and receiver of the Local United States Land Office at Los Angeles, California, acted beyond their jurisdiction and contrary to law, and arbitrarily, and without notice or hearing or trial, in cancelling the homestead application of plaintiff herein, as hereinbefore described and set forth, due to a misconstruction and misapplication and misconception of the law relating to the rights vested in this plaintiff by reason of his settlement on the lands described in said application, as hereinbefore alleged, and due to a misapplication and misconstruction and misconception of the law of the United States, relating to the preference right created and designated in said Act of Congress, of May 14, 1880; that for the same reason the then Commissioner of the General Land Office, and the then Secretary of the Interior of the United States, in considering and approving and affirming the action and decision of the said register and receiver, and of each other, misapplied, misconstrued and misconceived the laws of the United States, relating to the right acquired by said plaintiff in making his settlement and entry as aforesaid, and in denying the same, and cancelling the same, by reason of the alleged preference right of the said defendant, awarded him as aforesaid by said officers of the General Land Office,
23 by reason of the successful termination of said contest against the homestead entry of the said Charles W. Rider as aforesaid.

XIV.

That the register and receiver of the Local Land Office at Los Angeles, and the Commissioner of the General Land Office, and the Secretary of the Interior, in deciding against the right claimed by said plaintiff, under and by virtue of his settlement and homestead entry, as hereinbefore alleged, and in favor of the said defendant Lawrence G. Fleischer, by reason of the alleged preference right

awarded him, and recognized by the officers of the General Land Office of the United States, acted contrary to law, under and by reason of a misapprehension, a misconstruction, a misconception, and a disregard of the law of the United States relating to contests and homestead entries and settlers' rights and preference rights.

XV.

That all of the officers of the Land Department as herein before described, in denying plaintiff's right as a settler on the lands hereinbefore described, and the right acquired by him under the land laws of the United States, by reason of said settlement on April 18, 1910, and the filing of his application for homestead on May 18, 1910, and in granting the subsequent application to homestead made by the said defendant, Lawrence G. Fleischer, on the ground that he
24 had theretofore acquired a preference right under the laws of the United States, by reason of the successful termination of his contest by the prior homestead entry of the said Charles W. Rider, was without the jurisdiction of the said officer of the said Land Department, and was contrary to law, due to a misconstruction, misapplication and misconception of the law on the subject.

XVI.

That by reason of such misconstruction, misapplication and misconception of said laws as aforesaid, this plaintiff has been deprived of, and prevented from, attaining title to the said lands embraced within his said homestead application, and that the defendant, Lawrence G. Fleischer, has been granted the title to the same by a patent from the President of the United States, upon the action and decision of the said officers of the Land Department as afore-said, and not otherwise.

XVII.

That during all the times herein mentioned, and since April 18, 1910, plaintiff has been ready, able and willing and qualified, under the laws of the United States, to make and complete and perfect the homestead entry made by him as aforesaid, and that he had in fact complied with all the laws, and requirements of the laws of the United States, and all the rules and regulations of the Land Department of the United States, relating to homesteads, except as
25 prevented or prohibited by the officers of said Land Department, until he was ejected from said premises by judgment of the Superior Court of the State of California in and for the County of Riverside, entered April 24, 1915, as hereinbefore alleged.

Wherefore, plaintiff prays that a decree be entered herein declaring that the defendant holds the title to the lands hereinbefore described in trust for this plaintiff, and that the defendant be required to make a good and sufficient conveyance of said lands, and the title thereto to this plaintiff; and for the reasonable value of the use of said prem-

ises since April 24, 1915, and for costs of this action, and for such other and further relief that may, to the Court, seem meet and equitable.

HENRY M. WILLIS AND J. O. PHILLIPS,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Henry M. Willis being first duly sworn, says that he is attorney for the plaintiff in the above entitled action; and has his office in San Bernardino, in the County of San Bernardino; that
26 plaintiff is absent from the County of San Bernardino, and for that reason his attorney makes this verification; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and that as to those matters he believes it to be true.

HENRY M. WILLIS.

Subscribed and sworn to before me this 22nd day of December, 1915.

[SEAL.] MAE DRYSDALE,
Notary Public in and for the County of San Bernardino, State of California.

Filed Dec. 23, 1915. A. B. Pilch, Clerk, by O. A. Lowentrout, Deputy.

[Title of Court and Cause.]

Demurrer to Second Amended Complaint.

Comes now the defendant and demurs to the plaintiff's second amended complaint in the above entitled cause, upon the following grounds:

27 That said complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.

Wherefore, defendant prays the judgment of the court.

DUKE STONE,
Attorney for Defendant.

Filed Dec. 28, 1915. A. B. Pilch, Clerk, by O. A. Lowentrout, Deputy.

Minute Order.

January 14, 1916.

Minute Book 32, page 316.
Demurrer sustained with leave to plaintiff to amend his complaint within 10 days if he so desires.

[SEAL.]

A. B. PILCH,
Clerk,
By O. A. LOWENTROUT,
Deputy.

[Title of Court and Cause.]

Judgment.

On January 10th, 1916, came on to be heard defendant's demurrer to plaintiff's complaint in the above entitled cause, and the
28 plaintiff appearing by his attorney, Henry M. Willis, Esq., and the defendant appearing by his attorney, Duke Stone, Esq., and the Court after having heard the argument on behalf of plaintiff and defendant, and being well and sufficiently advised in the premises, finds that the defendant's demurrer should be, and the same was sustained on January 14th, 1916, and the plaintiff given ten days in which to file an amended complaint, and it appearing to the Court that on January 18th, 1916, that said attorney for plaintiff received and acknowledged notice of the action of the Court in sustaining defendant's demurrer, and that more than ten days have elapsed since said attorney for plaintiff received notice of the sustaining of said demurrer, and the plaintiff having failed to amend his complaint within the time provided by order of the Court, and elected to stand upon his said complaint.

It is ordered, adjudged and decreed by the Court, that the plaintiff's complaint be, and the same is hereby dismissed, and that judgment be entered in favor of the defendant, and that the defendant have and recover of and from the plaintiff his costs herein, taxed at $3.50.

F. E. DENSMORE,
Judge.

Dated this 4th day of February, 1916.

29 Filed Feb. 4, 1916. A. B. Pilch, Clerk, by Lyla Palmer, Deputy.

Recorded in Book 20 of Judgments at page 32 the 4th day of Feb. 1916.

A. B. PILCH,
Clerk,
By LYLA PALMER,
Deputy.

[Title of Court and Cause.]

Certificate to Judgment Roll.

I, A. B. Pilch, County Clerk of the County of Riverside, State of California, and ex-officio Clerk of the Superior Court, in and for said County, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled action, and recorded in Judgment Book 20 of said Court, at page 32. And I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness, my hand and the seal of said Superior Court, this 4th day of February, A. D., 1916.

[SEAL.]

A. B. PILCH,
Clerk,
By O. A. LOWENTROUT,
Deputy.

30 [Title of Court and Cause.]

Notice of Appeal.

To Duke Stone, Esq., Attorney for Defendant, and to Lawrence G. Fleischer, defendant, and to A. B. Pilch, Clerk of the aforesaid Court:

Please take notice, that the plaintiff above named hereby appeals to the Supreme Court of the State of California from the whole of that certain judgment made and entered in this action by said Court on the 4th day of February, 1916, wherein it is adjudged in said judgment that said plaintiff take nothing by his said action.

Dated this 18th day of March, 1916.

HENRY M. WILLIS AND
J. O. PHILLIPS,
Attorneys for Plaintiff.

Filed Mar. 20, 1916. A. B. Pilch, Clerk, by E. B. Harris, Deputy.

31 [Title of Court and Cause.]

Proof of Service by Mail.

STATE OF CALIFORNIA,
County of San Bernardino, ss:

Henry M. Willis being duly sworn deposes and says: that he is an attorney at law and is one of the attorneys for the above named plaintiff in the above entitled cause, and that he resides at Redlands, and has his office in San Bernardino, in the County of San Bernardino, California: That Duke Stone is the attorney of record for the above named defendant in said cause, and that the said Duke Stone resides

in the County of Los Angeles, and has his office at Rooms 434-436-438 Merchants National Bank Building, in the city of Los Angeles, California: That in each of said two places there is a United States post-office, and between said two places there is a regular daily communication by mail: That on the 22nd day of December, 1915, deponent served a true copy of the second amended complaint herein on the said Duke Stone, the said attorney of said defendant, by *depositing* such copy, on said date in the post-office at the city of San Bernardino aforesaid, properly enclosed in an envelope, addressed to said Duke Stone attorney at law at the address above given at Los Angeles, California, and prepaying the postage thereon.

HENRY M. WILLIS.

32 Subscribed and sworn to before me, this 22nd day of December, 1915.

[SEAL.] MAE DRYSDALE,
Notary Public in and for the County of San Bernardino, State of California.

Filed Dec. 23, 1915. A. B. Pilch, Clerk, by A. O. Lowentrout, Deputy.

[Title of Court and Cause.]

Clerk's Certificate.

STATE OF CALIFORNIA,
County of Riverside, ss:

I, A. B. Pilch, County Clerk and Ex-Officio Clerk of the Superior Court in and for said county, hereby certify that I have compared the foregoing transcript with the original papers in the above entitled action now on file in my office, and that the same contains full, true and correct copies of the Judgment Roll, Notice of Appeal from the Judgment, together with the endorsements on said papers, and documents, as the same now appear on file in my office.

I further certify that the Undertaking on Appeal from the Judgment, in due form, has been properly filed in my office,
33 within the time prescribed by law.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Superior Court this 24th day of April, 1916.

[SEAL.] A. B. PILCH,
Clerk.

[U. S. Revenue Stamp.]

34 By the Court:

It is ordered that the cases hereinafter named be and the same are hereby assigned to Department One and in accord with the stipulations on file that the same be and they hereby are submitted on the briefs on file.

L. A., No. 4736.

McLAREN

v.

FLEISCHER.

Dated January 20, 1919.

Minutes of the Supreme Court in Bank, January 20, 1919.

L. A., 4736.

McLAREN

v.

FLEISCHER.

By the Court:

The proper substitution having been made in the Superior Court and a certified copy of the order therein having been presented to and filed in this court, it is ordered that Archie J. McLaren, administrator of the Estate of John McLaren, deceased, be and he is hereby substituted as plaintiff and appellant in the above entitled matter in the place and stead of said John McLaren, deceased.

Dated February 13, 1919.

Shaw, P. J.

Minutes of Department One, February 13, 1919.

L. A., 4736.

McLAREN

v.

FLEISCHER.

By the Court:

The order heretofore made submitting the above entitled causes is vacated, for the purpose of giving leave to file additional briefs.

It is ordered that the appellant in each case be allowed thirty days within which to file briefs in reply to this point. Leonard, Surr & Hellyer are allowed fifteen days from the service of such brief within which to reply to the same and thereupon the causes are to stand submitted.

Minutes of Department One, June 17, 1919.

L. A., 4736.

McLAREN

v.

FLEISCHER.

By the Court:

All of the briefs having been filed pursuant to previous order cause submitted.
Dated July 22, 1919.

Shaw, P. J.

Minutes of Department One, July 22, 1919.

35

L. A., 4736.

McLAREN

v.

FLEISCHER.

The judgment is affirmed.
Lawlor, J.

We concur:
Shaw, J. Olney, J.

Minutes of Department One, December 1, 1919.

L. A., 4736.

McLAREN

v.

FLEISCHER.

By the Court:

Rehearing denied December 29, 1919. (All concur.)
Minutes of the Supreme Court in Bank, December 29, 1919.

36 October.

Filed Dec. 1, 1919. B. Grant Taylor, Clerk, by Erb, Deputy.

Department One.

L. A., No. 4736.

JOHN MCLAREN, Plaintiff and Appellant,

v.

L. G. FLEISCHER, Defendant and Respondent.

This appeal was taken from a judgment of the Superior Court of Riverside County dismissing plaintiff's complaint after a general demurrer was sustained and the plaintiff refused to amend.

The action was brought by the plaintiff against the defendant to procure a decree in equity declaring that the defendant holds the title to a certain quarter section of land in trust for the plaintiff, requiring the defendant to convey title to the plaintiff, and for the value of the use of the land for the period set forth in the complaint. The prayer of the complaint is based on allegations to the effect that the plaintiff was wrongfully, through mistake of law, deprived of such title, or the acquiring of such title, and the defendant was wrongfully, and by mistake of law, granted such title by the land department of the United States. There is no claim of fraud, either actual or constructive.

37 Before proceeding to a consideration of the points involved in this appeal it is proper to point out that the rule is well settled that the courts cannot exercise direct jurisdiction over the rulings of the officers of the land department of the United States, nor are the courts authorized to reverse or correct such rulings in collateral proceedings between private parties, but that the decisions of the land department are subject to review by the courts only where it appears that the land department has committed an error of law, and denied to the parties the rights to which they are entitled under the constitution and the laws of the United States. Under such circumstances the courts can in a proper proceeding, interfere and refuse to give effect to the action of the land department. In Quimby v. Conlan, (104 U. S. 420) it was said: "It would lead to endless litigation, and be fruitful of evil if a supervisory power were vested in the courts over the actions of the numerous officers of the land department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights, which upon a correct construction, would have been conceded to them, or when misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper pro-

ceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled." (Citing cases.) In Gage v. Gunther, (136 Cal. 338) this court declared: "If, however, in making such determination of fact, that tribunal (the land department of the United States) has disregarded the law applicable thereto, or has erred in its construction of the law or by reason of mistake has issued to one person a patent for the land which upon undisputed facts should have been issued to another who has contested his claim and has shown himself entitled to the patent, the person in whose favor the patent was issued will be held to
38 hold the land for the benefit of the one to whom it should have issued. Proceedings for this purpose are, however, to be taken in a court of equity, and are to be governed by the rules of equity procedure."

The following facts are taken from the complaint and must stand as true: On February 9, 1903, the southeast quarter of section 12, T. 7s., R. 22E., S. B. M., in the Palo Verde Valley, Riverside County, was open to public entry under the land laws of the United States, and on that day one Charles W. Rider made his homestead entry on said land by filing his application in the land office at Los Angeles. This quarter section, along with other lands, was withdrawn from all forms of entry on September 8, 1903, by order of the land department, under and by virtue of the Act of Congress, approved June 17, 1902, and known as the Reclamation Act (32 Stats. 388), such withdrawal being what is commonly known as "first form withdrawals," during the existence of which no lands embraced therein can be entered, selected or located in any manner.

On February 18, 1908, while these lands were still withdrawn from public entry, L. C. Fleischer, defendant and respondent herein, filed a contest of the Rider entry before the register and received of the local land office at Los Angeles, who sustained the contest and recommended to the Commissioner of the General Land Office that the Rider entry be cancelled. The Commissioner approved the recommendation and on January 26, 1909, cancelled the entry, and directed the register and receiver to advise all parties in interest. The defendant was notified by the register and receiver, of the cancellation of the entry, on February 11, 1909, and at the same time was notified by the register and receiver that he had been awarded a preference right to enter upon the said quarter section within thirty days after the said land had been restored to public entry. An order of the Secretary of the Interior, dated January 10, 1910, restored the quarter section, along with
39 other lands, to public settlement on April 18, 1910, and to public entry on May 18, 1910.

On the day that the land was restored to public settlement, April 18, 1910, the plaintiff, "being in all ways qualified under the laws to do so," made actual settlement on the quarter section hereinbefore mentioned, with the intention of claiming the land under the homestead laws of the United States. And on May 18, 1910, he

filed his homestead application, as such settler, in the local land office at Los Angeles, paid the fees required by law, continued thereafter to reside upon and improve the land, and "in fact complied with all the laws, and requirements of the laws of the United States, and all the rules and regulations of the Land Department of the United States, relating to homesteads, except as prevented or prohibited by the officers of said Land Department, until he was ejected from said premises by judgment of the Superior Court of the State of California in and for the County of Riverside, entered April 24, 1915."

The defendant, on May 18, 1910, made his application for entry on the same quarter section, but subsequent to the application of the plaintiff, claiming a preference right to make such entry, under and by virtue of the prefence right awarded him by the provisions of the act of May 14, 1880, hereinafter set forth. On the same day all the entries on this quarter section and certain other land were suspended, pending the settlement of a contest between the State of California and the United States as to the character and disposition of these lands. On May 22, 1912, the lands were again restored to public entry, subject to the applications already made. Some time later, namely, on June 3, 1912, the register and receiver of the local land office at Los Angeles rejected the application of the plaintiff and allowed that of the defendant, "on the sole ground that the said defendant had acquired a preference right by reason of the successful termination" of his contest of the Rider entry. Plaintiff appealed, but the Commissioner of the Land Office affirmed the decision of the register and receiver. In pursuance of this decision a patent for the said quarter section was issued to the defendant on January 15, 1915.

From the date of his settlement on the land April 18, 1910, until he was ejected under the judgment of the superior court above mentioned, the plaintiff lived on the land with his family and the complaint alleges that he has been always qualified, under the laws of the United States, to make the proposed homestead entry and has complied with all the requirements of said laws and all the rules and regulations of the Land Department of the United States relating to homesteads, except as prevented or prohibited by the officers of the Land Department.

The point is raised in the brief of amici curiæ that the "plaintiff has not connected himself with the government or shown that he is vested with the equitable title so as to enable him to maintain this action." There is clearly no merit in this contention. Section 2290 of the Revised Statutes of the United States provides:

"That any person applying to enter land shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person. * * * except himself, or herself, and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of

not more than eighty acres, and on payment of ten dollars when the entry if for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified." What constitutes an entry was laid down in Hastings, etc. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, Mr. Justice Lamar writing the opinion:

41

"Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered." (See also, Whittaker v. Pendola, 78 Cal. 296; Northern Pac. R. Co. v. Nelson, 22 Wash. 521.)

The case of Chapman v. Quinn (56 Cal. 266) is relied on to support the contention that the plaintiff has not connected himself with the government title sufficiently to entitle him to maintain the present action to declare the defendant trustee of the title for his benefit. This decision, however, is not in point. In that case the court was considering the preemption statute, which provided that before an entry could be made under that section is must be established to the satisfaction of the register and receiver that the applicant had settled upon and improved the land he sought to enter (p. 274). Section 2290, it will be observed, does not require the applicant to do anything more than the plaintiff herein had done in order to enter the land; that is to say, to make, subscribe and file in the proper land office the affidavit required by that section, and to pay the amount of money necessary to enter the quantity of land he applies for. When this is done his right is complete. The statement in the opinion of Mr. Justice Lamar which seems to imply that the entry is not complete until the officials execute a certificate of entry to him is not warranted by the statute. The applicant has put himself in privity with the government when he has done all he could do in the matter.

42

He is then in a position to compel the officials to do their duty toward him and to assert his right against others claiming a similar right from the government. The plaintiff in this case had complied in all respects with the law and stood in the relation of an entryman upon a homestead claim. In Chapman v. Quinn, under a lawful rule of the Land Department, Quinn had not been allowed to file any application or make any proof. The two cases are clearly distinct and different.

The only question presented and decided in the Land Department was whether the plaintiff or the defendant had the better or prior right to enter the land. This question was decided in favor of the defendant on the single ground that he had been granted a preference right. The sole question, therefore, which is presented for decision here is whether the officers of the Land Department made a mistake of law in granting the defendant a preference right, in the

recognition of which it became necessary to cancel plaintiff's entry.

A preference right is authorized by the Act of Congress of May 14, 1880, (21 Stats. 140) which reads in part as follows:

"Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register and receiver of the land office of the district in which such land is situated of such cancellation and shall be allowed thirty days from date of such notice to enter said lands."

At the time this act of 1880 was passed the Reclamation Act had not been enacted. It is obvious that the act of 1880 is based on the assumption that when the entry of one claimant was canceled the successful party could immediately enter the land. It contemplates land which would remain subject to entry during the contest.
43 The provision that the successful claimant should be allowed thirty days within which to enter the land after he was notified by the land office of the cancellation of his adversary's entry, was intended and supposed to give him thirty days, during the whole of which time he could complete his own entry. It cannot be conceived that the Congress intended to start the time of his preference running before it was possible for him to exercise his right thereto. The law gives the preferred right absolutely and the provisions regarding the giving of notice of necessity imply that the land shall be subject to entry at the time the notice is received and that it must be subject to entry before notice can become effective to start the time running. The notice which the act contemplates shall be given must be understood to be a notice which would give effect to the right intended to be preserved, and not a notice that would defeat it. In this case the land was not subject to entry at the time the contest was terminated and Rider's entry canceled. The register and receiver apparently so interpreted the effect of the act of 1880 when they sent the notice, for it informed the defendant that his preference right to enter the land would continue for thirty days after the land was restored to entry. The notice they gave must be construed as a notice to take effect on the restoration to entry of lands involved and not before. If this construction is not given, the object of the act of 1880 would be utterly defeated in all cases such as the one at bar. The land department itself has so understood and construed the act. Section 10 of the Reclamation Act gives to the secretary of the interior, authority to make such rules and regulations as may be necessary and proper to carry its provisions into effect. These provisions include his order restoring the land to entry after its
44 withdrawal. As evidence of the departmental construction of the act of 1880, certain regulations were promulgated on June 6, 1905, of which number 7 provides that "any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry." The land department with regard to lands so withdrawn, has consistently held to the proposition that the preference right to enter given

to the successful contestant by the act of 1880 does not begin to run until the land is again restored to entry, regardless of the time when he receives the official notice of cancellation of his adversary's entry. The construction placed upon an act of Congress by the land department, with respect to the disposition of public lands, and its practical application thereof, is always given great weight by the courts in construing the law and is followed if it is at all reasonable. We are satisfied that the land department correctly construed the act in the present case in its decision that the time within which the defendant could exercise his preference right, after the cancellation of the other entry, did not begin to run against him until the time of the restoration of the land to public entry. This occurred on May 18, 1910. This was in effect decided by the land department in the case of Fairchild v. Eby, 37 L. D. 362. Referring to the department regulations aforesaid and to the preference right allowed by the act of 1880 the secretary of the interior there said: "It was thus contemplated that the preference right allowed by the sixth section (of the regulations) should remain suspended if the land was not subject to entry at the date of cancellation, but that the preference right so acquired might be exercised whenever the land was restored." The sixth section refers to the preference right accruing under the act of 1880 aforesaid. To the same effect see Wright v. Fran-
45 cis, 36 L. D. 499; Beach v. Hansen, 40 L. D. 607; Wells v. Bodkin, 22 L. D. 340; Edwards v. Bodkin, 42 L. D. 172.

Appellant relies upon Edwards v. Bodkin, 249 Fed. 562, in support of his claim that the preference right was awarded to the respondent through a mistake of law. The decision there was not to the effect that the contestant was by mistake of law given the preference right. It was there held that the commissioner of the general land office had mistaken the law in declaring that the settler had abandoned his homestead claim. In discussing the question the court remarked that the Reclamation Act did not confer authority "upon the secretary of the interior to so extend the limitation of the act of May 14, 1880." This is the statement relied upon. It is unnecessary to determine in this case whether the reclamation act gave or could give legislative authority to the secretary of the interior or not. It is enough for the purpose of this case to say that he may construe the act of 1880 in connection with the Reclamation Act, and if the construction he adopts is reasonable it will be upheld and followed by the courts.

For these reasons we are of the opinion that the preferred right of the defendant to complete his entry and thereupon occupy the land for the purpose of acquiring a homestead patent did not begin to run until the time of the restoration of the land to entry, when for the first time it became possible for him to exercise the right given by the statute. The demurrer was properly sustained.

The judgment is affirmed.

LAWLOR, *J.*

We Concur:
SHAW, *J.*
OLNEY, *J.*

46 In the Supreme Court of the State of California.

L. A., No. 4736.

JOHN MCLAREN, Plaintiff and Appellant,
vs.
L. G. FLEISCHER, Defendant and Respondent.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the Minute Orders of the Supreme Court in Bank and in Department One, made and entered on the dates therein specified; and a copy of the opinion of Department One of said Court, in the above entitled action.

And I further certify that the remittitur in the above entitled action was issued and sent to the County Clerk of Riverside County California, on January 2, 1920, as shown by the records of my office.

Witness my hand and the seal of the Court, this 2nd day of April A. D. 1920.

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
Clerk.
By M. C. VAN ALLEN,
Deputy Clerk, Los Angeles Office.

47 I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Transcript on Appeal in La 4736, John McLaren vs. L. G. Fleischer, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 24th day of Febru ary, A. D. 1920.

[Seal of Supreme Court of California.]

B. GRANT TAYLOR,
Clerk.
By M. C. VAN ALLEN,
Deputy Clerk, Los Angeles Office.

Service of the within by copy is hereby admitted this — day o April, 1916. DUKE STONE,
Attorney for Defendant and Respondent.

Received a copy of the within this 24th day of April, 1916, for th Judge of the Superior Court of Riverside County, State of California
A. B. PILCH,
Clerk of said Superior Court,
By O. A. LOWENTROUT,
Deputy.

48 In the Supreme Court of the State of California.

L. A. 4736.

ARCHIE J. MCLAREN, Administrator of the Estate of John McLaren, Deceased, Plaintiff and Appellant,

vs.

L. G. FLEISCHER, Defendant and Respondent.

Stipulation on Return to Writ of Certiorari.

Whereas, the Supreme Court of the United States did, on the 6th day of May, 1920, duly issue over the hand of the Clerk, and under the seal of said Court, a Writ of Certiorari in the above entitled action, and directed to the Honorable Judges of the Supreme Court of the State of California, and commending them to send without delay, to the said Supreme Court of the United States, the record and proceedings in said cause, and

Whereas, duly certified copies of the said record and proceedings have been heretofore filed in the office of the Clerk of said Supreme Court of the United States, and have been printed as certified, and the printed copies filed as required by the rules of said Court; and

Whereas, the written decision of the Supreme Court of California in said cause, has been printed and filed with the petition for said Writ in the office of the Clerk of said United States Supreme Court.

It is therefore stipulated, by and between, the Appellant and the Respondent herein, through their respective counsel, that the certified transcript of the record and proceedings, and the said decision as printed in said petition heretofore filed, and now on file in the office of the Clerk of the Supreme Court of the United States may
49 be taken and considered as the return to the said Writ of Certiorari, and that a copy of this stipulation, duly certified by the Clerk of the Supreme Court of California, may be transmitted and taken as the return of said Judges of the Supreme Court of California to said Writ.

Dated May 14, 1920.

HENRY M. WILLIS,
SAMUEL HERRICK, *of Counsel,*
Attorneys for Appellant.
DUKE STONE,
Attorney for Respondent.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify in obedience to the writ of certiorari hereto attached and returned herewith, the foregoing to be a true and correct copy of the stipulation of counsel filed in said cause on the 14th day of May, 1920, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 9th day of June, A. D. 1920.

[Seal of Supreme Court of California.]

B. GRANT TAYLOR,
Clerk, San Francisco Office.

50 [Endorsed:] 831/27586. No. L. A. 4736. In the Supreme Court of the State of California. Archie J. McLaren, administrator of the estate of John McLaren, deceased, Appellant, vs. L. G. Fleischer, Respondent. Stipulation on return to writ of certiorari. Filed May 14, 1920. B. Grant Taylor, Clerk.

51 The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of California, Greeting:

Being informed that there is now pending before you a suit in which Archie J. McLaren, Administrator of the Estate of John McLaren, deceased, is appellant, and L. G. Fleischer is respondent, L. A. No. 4736, which suit was removed into the said Supreme Court by virtue of an appeal from the Superior Court of Riverside County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the
52 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

53 [Endorsed:] L. A. 4736. Original. File No. 27,586. Supreme Court of the United States. No. 831, October Term, 1919. Archie J. McLaren, Administrator, etc., vs. L. G. Fleischer. Writ of Certiorari. Filed May 14, 1920. B. Grant Taylor, Clerk, by Wm. J. Traeger, Deputy.

54 [Endorsed:] File No. 27586. Supreme Court U. S. October Term, 1920. Term No. 831. Archie J. McLaren, adm'r, &c., petitioner, vs. L. G. Fleischer. Writ of certiorari and return. Filed June 15, 1920.

FILED
MAR 26 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 291

ARCHIE J. MCLAREN, ADMINISTRATOR OF THE ESTATE OF JOHN MCLAREN, DECEASED, *Petitioner,*

vs.

L. G. FLEISCHER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

AND

BRIEF IN SUPPORT THEREOF.

SAMUEL HERRICK,
HENRY M. WILLIS,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. ———.

ARCHIE J. MCLAREN, ADMINISTRATOR OF JOHN MCLAREN, DECEASED, *Petitioner*,

vs.

L. G. FLEISCHER, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Archie J. McLaren, administrator, respectfully petitions this Honorable Court to require that the proceedings in a decree of the Supreme Court of the State of California in the case of Archie McLaren, substituted for John McLaren, plaintiff and appellant, vs. L. G. Fleischer, defendant and respondent, L. A. No. 4736, in

said court on appeal from the Superior Court of Riverside County, be certified to this Honorable Court for review and determination, with the same power and authority and with like affect as if brought to this Honorable Court by appeal or writ of error pursuant to law.

This action was brought by the petitioner's decedent against the respondent to procure a decree in equity declaring respondent to hold the title to a certain quarter section of land in trust for John McLaren by reason of the latter's settlement made and homestead application tendered prior to the homestead application of the respondent. Relief was denied by the Superior Court of Riverside County, and on appeal to the Supreme Court of California the judgment was sustained upon the ground that respondent had acquired a contestant's preference right of entry while the land was withdrawn under the reclamation act, that such right remained suspended during the withdrawal, preventing the acquisition of any settlement rights, and that it continued in force during a period of thirty days after the reclamation withdrawal was finally revoked.

After the case reached the Supreme Court of California the plaintiff and appellant died, whereupon your petitioner duly qualified as administrator of his estate and was substituted as party plaintiff.

Under Section 237 of the Judicial Code (36 Stat., 1156), as amended September 6, 1916 (39 Stat., 726), and as construed by this Court in Ireland vs. Woods (246 U. S., 323), a writ of error does not lie in this case and the judgment below is reviewable only by *certiorari*.

This petition for writ of *certiorari* is based on the following grounds:

I.

That the opinion of the highest court of the State of California in this cause, holding that the respondent could and

did secure a preference right to the land in controversy, under the Act of May 14, 1880 (21 Stat., 141), which right took effect after said land had been restored from the reclamation withdrawal, is in direct conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Edwards vs. Bodkin (249 Fed. Rep., 562, 568). The latter case involved land in the near vicinity of that here in controversy, and hence this Honorable Court should take action to bring about a uniformity of decisions.

II.

That under the express provisions of the said act of May 14, 1880, a contestant's preference right must be exercised within thirty days after the notice of the cancellation of the entry contested, and there is no authority in the Secretary of the Interior, either under the Reclamation Act of June 17, 1902 (32 Stat., 388), or otherwise, to extend this time to thirty days after the land shall have been restored from the reclamation withdrawal under which it was at the time of the contest or at the time of the cancellation.

III.

That the allowance of the preference right aforesaid is also contrary to the Interior Department's Regulations of January 19, 1909 (37 Land Decisions, 365), providing that "no contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest."

IV.

That the petitioner's decedent was an actual settler in good faith upon the tract of land here involved in reliance upon the aforesaid Regulations of the Secretary of the Interior, and his rights should, therefore, be protected; whereas, the respondent was a later settler and a later applicant for the land, who relied entirely upon the alleged preference right aforementioned.

Attention is also called to the fact that there were no printed copies of the State court's decision available for insertion in the certified copy of the transcript of the record, and hence copy of said decision is printed as an exhibit hereto.

Wherefore, your petitioner respectfully requests this Honorable Court to grant the prayer of this petition as set forth in the first paragraph hereof, and that your petitioner may be allowed and receive such other orders as he may be entitled to, and that such decision of the Supreme Court of the State of California may be reviewed and reversed by this Honorable Court.

SAMUEL HERRICK,
HENRY M. WILLIS,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. ———.

ARCHIE MCLAREN, ADMINISTRATOR OF THE ESTATE OF JOHN MCLAREN, DECEASED, *Petitioner*,

vs.

L. G. FLEISCHER, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The facts of this case may be briefly summarized as follows:

In February, 1908, the respondent, L. G. Fleischer, filed a contest against the homestead entry of one Charles W. Rider covering the SE¼ of Section 12, T. 7 S., R. 22 E., S. B. M., California, while said land was withdrawn under the first form of the reclamation act of 1902, which contest was finally decided and the Rider entry canceled on January 28, 1909. Thereafter and on February 11, 1909, the Register and Receiver notified respondent of the cancellation of the said entry.

Prior thereto, and on January 19, 1909 (37 Land Decisions, 365), the Interior Department issued general instructions, providing as follows:

> "No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest."

On January 10, 1910, the Secretary of the Interior restored said tract with other lands to public settlement on April 18, 1910, and to public entry on May 18, 1910, and on the date first mentioned, to wit, April 18th, John McLaren, with due qualifications under the homestead laws, made actual settlement on the land, established his residence and remained thereon until ejected therefrom under judicial procedure on April 24, 1915. He also filed homestead application on May 18, 1910, the date the land was first opened to entry, and continuously asserted same before the Land Department, exhausting all remedies there.

On May 18, 1910, subsequent to McLaren's application, respondent filed a homestead application without asserting any settlement but relying wholly on his alleged preference right, which application was allowed by the Land Department and patent issued to him in January, 1915, after repeated decisions by the Interior Department in his favor and against John McLaren. Promptly thereafter the latter commenced action in the local courts to have a trust impressed on the land in his favor, and a final decision against the administrator of his estate has been rendered by the Supreme Court of the State of California.

I.

This is one of a large number of companion cases involving lands withdrawn under the first form of a reclamation withdrawal, then contested and later restored to settlement and entry. Several of the cases have been decided by the State courts in favor of those holding the preference rights, and only one, namely, that of Edwards vs. Bodkin (249 Fed. Rep., 562), has been decided by the Federal Courts. The decision of that court is exactly the reverse of the opinion of the State courts in the instant case and other cases, and, accordingly, this Honorable Court should now take jurisdiction in order to harmonize these differences.

The State court in the present case holds that Edwards vs. Bodkin was determined upon a mistake of the General Land Office in declaring that the settler had abandoned his homestead claim. But while this was considered first in the decision of Judge Morrow, yet the court went still further and declared in unmistakable language that the act of May 14, 1880, only allows a preference right for thirty days after the Register issues notice of the cancellation of the land contested, and that the reclamation act of 1902 does not give any authority to the Secretary of the Interior to extend the limitation of the act of May 14, 1880; hence that the Regulations of June 6, 1905 (33 Land Decisions, 607), assuming to extend them, were issued without authority, of law; and, finally, that even though there was an authority for the said Regulations of 1905 they were vacated by the Regulations of January 19, 1909, prior to the cancellation of the entry there involved and the attempted award of a preference right thereon. As Judge Morrow cogently observes:

> "If we hold that the Secretary of the Interior had the authority to make the Regulations of June 6, 1905, we must also hold that he had the authority to make the Regulations of January 19, 1909. If he had the authority to make, he had the authority to unmake. If he could amend or modify the statute in one case he could do so in the other."

As this is one of a large number of companion cases which have been pending in various forms before the Interior Department and the Federal and State Courts for the past ten years, it is earnestly submitted that these differences of opinion between the United States and the California courts should be ironed out, and hence that this Honorable Court should take jurisdiction in the present instance.

II.

The opinion of Judge Morrow is not only directly at issue with that of the highest court of the State of California, but is, we submit, eminently correct.

The act of May 4, 1880, *supra*, provides in express terms that the successful contestant against any pre-emption, homestead or timber-culture entry "shall be notified by the Register of the land office * * * of such cancellation, and shall be allowed *thirty days from date of such notice* to enter said land."

In the present instance respondent Fleischer was notified by the Register and Receiver of the cancellation of the Rider entry on February 11, 1909 (Record, p. 17), but he never tendered his homestead application until May 18, 1910, or one year, three months and one week later. This is certainly not the "thirty days" mentioned by the statute.

The above-quoted provision of the act of 1880 has never been repealed or modified by law, and we submit that it

could not be by ukase of the Interior Department. The general provision in the Reclamation Act authorizing the Secretary of the Interior to make rules and regulations to carry it into effect should certainly not be construed as a repeal of a provision of a previous act of Congress passed on a different subject, and to so construe the later act would go contrary to all of the rules of statutory construction, particularly the rule that a repeal of a statute by implication is not favored (Potter's Dwarris on Statutes, 156; Sedgwick on Statutory Construction, 98; McCool vs. Smith, 1 Black, 470; "The Distilled Spirits," 11 Wallace, 356; State vs. Stoll, 17 Wallace, 430).

To quote from the Department itself, namely, from a well considered decision of Secretary Hitchcock (Edwin J. Miller, 35 L. D., 411), which cited and followed numerous decisions of this court:

> "Where a complete system has been adopted for the disposal of lands of a particular character, it will not be presumed that Congress intended by subsequent legislation to supersede such system and to dispose of those lands in a different manner, unless such purpose is clearly expressed or indicated, or unless the two statutes are irreconcilable."

III.

Finally, we urge that the Departmental Regulations of January 19, 1909, quoted above, should be given effect by the courts even if the Interior Department has seen fit to repudiate them. They were issued three weeks before the Rider entry was noted canceled on the local office records and more than a year prior to John McLaren's settlement on the land. During all of that time they were in full force and effect, the petitioner's decedent and settler relied upon them and he had every right to so rely. He has

waged a ten-year fight to bring about their enforcement and so have the other settlers in the companion cases, some of whom even suffered criminal prosecution and imprisonment in an effort to maintain their rights (Edwards and Culpepper vs. United States, 223 Fed. Rep., 309).

The law deals tenderly with the rights of a settler on the public lands (Ard vs. Brandon, 156 U. S., 537, 543; Tarpey vs. Madsen, 178 U. S., 215, 221).

> "It is a well established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." (Lytle vs. Arkansas, 9 Howard, 314.)

Accordingly, we respectfully urge that not only the law but the equities are with the petitioner here, his decedent being both the prior applicant and the prior settler while his adversary relies upon a mere paper right, which was in conflict with a positive act of Congress and had been declared nonexistent by regulations of the Department of the Government charged with the administration of the public domain.

Accordingly, we submit that the petition for certiorari should be allowed and the record reviewed by this court.

Respectfully submitted,

SAMUEL HERRICK,

HENRY M. WILLIS,

Attorneys for Petitioner.

EXHIBIT A.

OCTOBER.

Filed, Dec. 1, 1919, B. Grant Taylor, Clerk. By Erb. Deputy.

DEPARTMENT ONE.

ARCHIE J. McLAREN, ADMINISTRATOR OF JOHN McLAREN, DECEASED, *Plaintiff and Appellant,*

vs.

L. G. FLEISCHER, *Defendant and Respondent.*

This appeal was taken from a judgment of the Superior Court of Riverside County dismissing plaintiff's complaint after a general demurrer was sustained and the plaintiff refused to amend.

The action was brought by the plaintiff against the defendant to procure a decree in equity declaring that the defendant holds the title to a certain quarter section of land in trust for the plaintiff, requiring the defendant to convey title to the plaintiff, and for the value of the use of the land for the period set forth in the complaint. The prayer of the complaint is based on allegations to the

effect that the plaintiff was wrongfully, through mistake of law, deprived of such title, or the acquiring of such title, and the defendant was wrongfully, and by mistake of law, granted such title by the land department of the United States. There is no claim of fraud, either actual or constructive.

Before proceeding to a consideration of the points involved in this appeal it is proper to point out that the rule is well settled that the courts cannot exercise direct jurisdiction over the rulings of the officers of the land department of the United States, nor are the courts authorized to reverse or correct such rulings in collateral proceedings between private parties, but that the decisions of the land department are subject to review by the courts only where it appears that the land department has committed an error of law and denied to the parties the rights to which they are entitled under the constitution and the laws of the United States. Under such circumstances the courts can in a proper proceeding, interfere and refuse to give effect to the action of the land department. In Quimby vs. Conlan (104 U. S., 420) it was said: "It would lead to endless litigation, and be fruitful of evil if a supervisory power were vested in the courts over the actions of the numerous officers of the land department, or mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights, which upon a correct construction, would have been conceded to them, or when misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and

the matter should be deemed settled." (Citing cases.) In Gage vs. Gunther (136 Cal. 338) this court declared: "If, however, in making such determination of fact, that tribunal (the land department of the United States) has disregarded the law applicable thereto, or has erred in its construction of the law or by reason of mistake has issued to one person a patent for the land, which upon undisputed facts should have been issued to another who has contested his claim and has shown himself entitled to the patent, the person in whose favor the patent was issued will be held to hold the land for the benefit of the one to whom it should have been issued. Proceedings for this purpose are, however, to be taken in a court of equity, and are to be governed by the rules of equity procedure."

The following facts are taken from the complaint and must stand as true: On February 9, 1903, the southeast quarter of section 12, T. 7S., R. 22E., S.B.M., in the Palo Verde Valley, Riverside County, was open to public entry under the land laws of the United States, and on that day one Charles W. Rider made his homestead entry on said land by filing his application in the land office at Los Angeles. This quarter section, along with other lands, was withdrawn from all forms of entry on September 8, 1903, by order of the land department, under and by virtue of the Act of Congress, approved June 17, 1902, and known as the Reclamation Act (32) Stats. 388), such withdrawal being what is commonly known as "first form withdrawals," during the existence of which no lands embraced therein can be entered, selected or located in any manner.

On February 18, 1908, while these lands were still withdrawn from public entry, L. G. Fleischer, defendant and respondent herein, filed a contest of the Rider entry before the register and receiver of the local land office at Los

Angeles, who sustained the contest and recommended to the Commissioner of the General Land Office that the Rider entry be cancelled. The Commissioner approved the recommendation and on January 26, 1909, cancelled the entry, and directed the register and receiver to advise all parties in interest. The defendant was notified by by the register and receiver, of the cancellation of the entry, on February 11, 1909, and at the same time was notified by the register and receiver that he had been awarded a preference right to enter upon the said quarter section *within thirty days after the said land had been restored to public entry.* An order of the Secretary of the Interior, dated January 10, 1910, restored the quarter section, along with other lands, to public settlement on April 18, 1910, and to public entry on May 18, 1910.

On the day that the land was restored to public settlement, April 18, 1910, the plaintiff, "being in all ways qualified under the laws to do so," made actual settlement on the quarter section hereinbefore mentioned, with the intention of claiming the land under the homestead laws of the United States. And on May 18, 1910, he filed his homestead application, as such settler, in the local land office at Los Angeles, paid the fees required by law, continued thereafter to reside upon and improve the land, and "in fact complied with all the laws, and requirements of the laws of the United States, and all the rules and regulations of the Land Department of the United States, relating to homesteads, except as prevented or prohibited by the officers of said Land Department, until he was ejected from said premises by judgment of the Superior Court of the State of California, in and for the County of Riverside, entered April 24, 1915."

The defendant, on May 18, 1910, made his application for entry on the same quarter section, but subsequent to

the application of the plaintiff, claiming a preference right to make such entry, under and by virtue of the preference right awarded him by the provisions of the act of May 14, 1880, hereinafter set forth. On the same day all the entries on this quarter section and certain other land were suspended, pending the settlement of a contest between the State of California and the United States as to the character and disposition of these lands. On May 22, 1912, the lands were again restored to public entry, subject to the applications already made. Some time later, namely, on June 3, 1912, the register and receiver of the local land office at Los Angeles rejected the application of the plaintiff and allowed that of the defendant, "on the sole ground that the said defendant had acquired a preference right * * * by reason of the successful termination" of his contest of the Rider entry. Plaintiff appealed, but the Commissioner of the Land Office affirmed the decision of the register and receiver. In pursuance of this decision a patent for the said quarter section was issued to the defendant on January 15, 1915.

From the date of his settlement on the land April 18, 1910, until he was ejected under the judgment of the superior court above mentioned, the plaintiff lived on the land with his family and the complaint alleges that he has been always qualified, under the laws of the United States, to make the proposed homestead entry and has complied with all the requirements of said laws and all the rules and regulations of the Land Department of the United States relating to homesteads, except as prevented or prohibited by the officers of the Land Department.

The point is raised in the brief of *Amici curiae* that the "plaintiff has not connected himself with the government or shown that he is vested with the equitable title so

as to enable him to maintain this action." There is clearly no merit in this contention. Section 2290 of the Revised Statutes of the United States provides:

"That any person applying to enter land * * * shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, * * * except himself, or herself, and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified." What constitutes an entry was laid down in Hastings, etc., Co. vs. Whitney, 132 U. S., 357, 33 L. ed., 363, Mr. Justice Lamar writing the opinion:

"Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered." (See also, Whittaker vs. Pendola, 78 Cal., 296; Northern Pac. R. Co. vs. Nelson, 22 Wash., 521.)

The case of Chapman vs. Quinn (56 Cal., 266) is relied on to support the contention that the plaintiff has not connected himself with the government title sufficiently to entitle him to maintain the present action to declare the defendant trustee of the title for his benefit. This decision,

however, is not in point. In that case the court was considering the pre-emption statute, which provided that before an entry could be made under that section it must be established to the satisfaction of the register and receiver that the applicant had settled upon and improved the land he sought to enter (p. 274). Section 2290, it will be observed, does not require the applicant to do anything more than the plaintiff herein had done in order to enter the land; that is to say, to make, subscribe and file in the proper land office the affidavit required by that section, and to pay the amount of money necessary to enter the quantity of land he applies for. When this is done his right is complete. The statement in the opinion of Mr. Justice Lamar which seems to imply that the entry is not complete until the officials execute a certificate of entry to him is not warranted by the statute. The applicant has put himself in privity with the government when he has done all he could do in the matter. He is then in a position to compel the officials to do their duty toward him and to assert his right against others claiming a similar right from the government. The plaintiff in this case had complied in all respects with the law and stood in the relation of an entryman upon a homestead claim. In Chapman vs. Quinn, under a lawful rule of the Land Department, Quinn had not been allowed to file any application or make any proof. The two cases are clearly distinct and different.

The only question presented and decided in the Land Department was whether the plaintiff or the defendant had the better or prior right to enter the land. This question was decided in favor of the defendant on the single ground that he had been granted a preference right. The sole question, therefore, which is presented for decision here is whether the officers of the Land Department made a mistake of law in granting the defendant a preference

right, in the recognition of which it became necessary to cancel plaintiff's entry.

A preference right is authorized by the Act of Congress of May 14, 1880 (21 Stats., 140) which reads in part as follows:

"Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber cultiure entry, he shall be notified by the register and receiver of the land office of the district in which such land is situated of such cancellation and *shall be allowed* thirty days from date of such notice to enter said lands."

At the time this act of 1880 was passed the Reclamation Act had not been enacted. It is obvious that the act of 1880 is based on the assumption that when the entry of one claimant was cancelled the successful party could immediately enter the land. It contemplates land which would remain subject to entry during the contest. The provision that the successful claimant should be allowed thirty days within which to enter the land after he was notified by the land office of the cancellation of his adversary's entry, was intended and supposed to give him thirty days, during the whole of which time he could complete his own entry. It cannot be conceived that the Congress intended to start the time of his preference running before it was possible for him to exercise his right thereto. The law gives the preferred right absolutely and the provisions regarding the giving of notice of necessity imply that the land shall be subject to entry at the time the notice is received and that it must be subject to entry before the notice can become effective to start the time running. The notice which the act contemplates shall be given must be understood to be a notice which would give effect to the right intended to be preserved, and not a notice that would

defeat it. In this case the land was not subject to entry at the time the contest was terminated and Rider's entry canceled. The register and receiver apparently so interpreted the effect of the act of 1880 when they sent the notice, for it informed the defendant that his preference right to enter the land would continue for thirty days after the land was restored to entry. The notice they gave must be construed as a notice to take effect on the restoration to entry of lands involved and not before. If this construction is not given, the object of the act of 1880 would be utterly defeated in all cases such as the one at bar. The land department itself has so understood and construed the act. Section 10 of the Reclamation Act gives to the secretary of the interior, authority to make such rules and regulations as may be necessary and proper to carry its provisions into effect. These provisions include his order restoring the land to entry after its withdrawal. As evidence of the departmental construction of the act of 1880, certain regulations were promulgated on June 6, 1905, of which number 7 provides that "any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from the notice that the lands involved have been *released* from such withdrawal and made subject to entry." The land department with regard to lands so withdrawn, has consistently held to the proposition that the preference right to enter given to the successful contestant by the act of 1880 does not begin to run until the land is again restored to entry, regardless of the time when he received the official notice of cancellation of his adversary's entry. The construction placed upon an act of Congress by the land department, with respect to the disposition of public lands, and its practical application thereof, is always given great weight by the courts in construing the law and is followed if it is at

all reasonable. We are satisfied that the land department correctly construed the act in the present case in its decision that the time within which the defendant could exercise his preference right, after the cancellation of the other entry, did not begin to run against him until the time of the restoration of the land to public entry. This occurred on May 18, 1910. This was in effect decided by the land department in the case of Fairchild vs. Eby, 37 L.D., 362. Referring to the department regulations aforesaid and to the preference right allowed by the act of 1880 the secretary of the interior there said: "It was thus contemplated that the preference right allowed by the sixth section (of the regulations) should remain suspended if the land was not subject to entry at the date of cancellation, but that the preference right so acquired might be exercised whenever the land was restored." The sixth section refers to the preference right accruing under the act of 1880 aforesaid. To the same effect see Wright vs. Francis, 36 L.D., 499; Beach vs. Hansen, 40 L.D., 607; Wells vs. Bodkin, 22 L.D., 340; Edwards vs. Bodkin, 42 L.D., 172.

Appellant relies upon Edwards vs. Bodkin, 249 Fed. 562, in support of his claim that the preferred right was awarded to the respondent through mistake of law. The decision there was not to the effect that the contestant was by mistake of law given the preference right. It was there held that the commissioner of the general land office had mistaken the law in declaring that the settler had abandoned his homestead claim. In discussing the question the court remarked that the Reclamation Act did not confer authority "upon the secretary of the interior to so extend the limitation of the act of May 14, 1880." This is the statement relied upon. It is unnecessary to determine in this case whether the reclamation act gave or could give legislative authority to the secretary of the interior or not.

It is enough for the purpose of this act to say that he may construe the act of 1880 in connection with the Reclamation Act, and if the construction he adopts is reasonable it will be upheld and followed by the courts.

For these reasons we are of the opinion that the preferred right of the defendant to complete his entry and thereupon occupy the land for the purpose of acquiring a homestead patent did not begin to run until the time of the restoration of the land to entry, when for the first time it became possible for him to exercise the right given by the statute. The demurrer was properly sustained.

The judgment is affirmed.

LAWLOR, J.

We concur:

SHAW, J.

OLNEY, J.

FILED
MAR 28 1921
JAMES D. MAHE
CL

Nos. 291 and 292

IN THE

Supreme Court of the United States

October Term 1920

No. 291

ARCHIE J. McLAREN,
Administrator of the Estate of
John McLaren, Deceased, Petitioner
v.
L. G. FLEISCHER

On Writ of Certiorari to The Supreme Court of The State of California.

No. 292

ROBERT L. CULPEPPER, *Petitioner*
v.
JAMES M. OCHELTREE

On Writ of Certiorari to The Supreme Court of The State of California.

MOTION TO ADVANCE.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Motion to Advance	1
Reasons for Advancing	2
Indentity of the Questions in Nos. 291, 292 and 495 and the Propriety of Consideration of the Petition for Rehearing in No. 495 in Conjunction with this Motion to Advance	7
Our Apology for Prolixity	13

IN THE

Supreme Court of the United States

October Term 1920

No. 291

ARCHIE J. McLAREN,

Administrator of the Estate of John McLaren, Deceased, Petitioner

v.

L. G. FLEISCHER

On Writ of Certiorari to The Supreme Court of The State of California.

No. 292

ROBERT L. CULPEPPER, *Petitioner*

v.

JAMES M. OCHELTREE

On Writ of Certiorari to The Supreme Court of The State of California.

MOTION TO ADVANCE.

Comes now the respondents in Nos. 291 and 292, by their counsel of record, and respectfully move the Court to advance the above entitled cases to be heard at the earliest date in the present term as may be consistent with the convenience of the court and immediately following the argument in

No. 495, in event the Court grants the petition for rehearing which has been filed in the last numbered case.

REASONS FOR ADVANCING.

These two cases (Nos. 291 and 292) are before this court on certiorari to the Supreme Court of the State of California. They involve precisely the same questions which, as we very respectfully but earnestly and sincerely submit, were *duly* presented in No. 495, Bodkin vs. Edwards, an appeal to this court from the Circuit of Appeals for the Ninth Circuit.

None of the several legal questions of far reaching importance which were presented in the assignment of errors in No. 485 was determined in the opinion this court expressed in that case on February 28, 1921, in an affirmance of the decree of the said Circuit Court of Appeals. In passing it may be appropriate to remark that the affirmance in that case was made on a motion to dismiss or affirm, to which motion no answer was made by the appellant because of the conviction of his counsel that said motion conspicuously failed to set out or even allude to a single valid reason for a dismissal or an affirmance. Said counsel now truly regrets that he advised the withholding of an answer, for he is morally certain that if an answer had been made this Court's attention would necessarily have been directed to matters precluding the possibility of such an announcement by it as was made in its opinion, to wit: that "the case as presented here turns essentially on questions of fact." This stated reason for the affirmance was not even remotely suggested in the motion to dismiss or affirm.

In a motion for rehearsing in No. 495, which has recently been filed, we have clearly shown, as we profoundly believe, that the decisions of the district and appellate courts in that case necessarily turn essentially and entirely on ques-

tion of law—that matters of fact were neither relied upon by either party to the litigation nor ever urged upon any of the lower courts—*and that all the questions of law in the said case are identical with all the question of law which are presented in Nos. 291 and 292.* It is due to these considerations that we have suggested to the court in this motion that it make order for argument in Nos. 291, 292 and 495, in event the petition for rehearsing in the latter is entertained, at approximately the same time.

The affirmance in No. 495 remarks that the record therein "does not contain all the evidence that was before the courts below, a part having been omitted under the appellant's specification of what should be included." We very respectfully submit that upon consideration of the petition for rehearing in No. 495, this court will apprehend that no cause exists for suggestion from any source of a diminution of the record. Each party to the cause was entirely free to designate any parts of the record printed which he deemed essential to presentation to this court of what he conceived to be the true and only issues in the proceeding. As a matter of record fact it is evident from the designations for printing which both parties to the controversy filed that *they both realized that the only questions that could possibly be presented to this court were questions of law exclusively.*

It is true that the appellee designated for printing certain testimony *given in the District Court* by the appellee, Edwards, and one McFee. This testimony is set out at pages 65 to 71 of the record. Perusal thereof will be convincing of the fact that it was taken in a futile attempt to have the courts below find error in the decisions of the Department of the Interior in the contest proceedings with respect to matters of fact. Re-perusal of all of the decisions of the courts below in No. 495 will be convincing that none of those

courts rested any of their decisins upon findings of fact. *Such perusal will be convincing that in everyone of those decisions the determinative matter was a matter of law exclusively, to wit, whether any of the allegations of the bill of complaint were material, the Court of Appeals, alone, adjudging the materiality thereof and the District Court under the "law of the case" doctrine being constrained to accept the Appellate Courts views on materiality.* We beg leave to add in this connection that with the exception of this testimony from the appellee, Edwards, and the said McFee, the record in No. 495 contains no testimony or evidence other than that which we shall refer to as documentary, because consisting of notations on the records in the United States Land Office at Los Angeles, California (R. 30 to 37; 48 to 49; 54 to 56), papers in appellant's contest in the land department against appellee's homestead entry (R. 34 to 36), the appellee's alleged final proof which he submitted subsequent to the hearing on the contest and a decision by the Register and Receiver therein adverse to him (R. 44 to 48 for such proof and 37 for such decision), and *eight decisions of officers of the Land Department*, all adverse to appellee which were rendered in the period from December 31, 1908 to April 6, 1915.

The comments in the two foregoing paragraphs are made by us in the hope that this Court may find it possible to be in agreement with us that the identity of the legal questions in Nos. 291, 292 and 495 is not in any wise affected by the fact that a scant amount of inadmissible and incompetent testimony was taken *from the witness chair in the District Court* in No. 495, while in Nos. 291 and 292 the cases were heard and determined on demurrers to the complaints.

In No. 495 the Circuit of Appeals, 249 Fed. 562, 567, committed the very serious error of holding that the 5th Section of the Act of June 27, 1906, 34 Stat. 519, 520,

which expressly and exclusively relates to desert land entries, relieved from contest on a charge of abandonment every homestead entry of public lands situated within an area withdrawn under first form in aid of the purposes of the Reclamation Act of June 17, 1902, 32 Stat. 388. Said appellate court's said opinion is very plainly to the effect that cancellation by the Land Department of a homestead entry upon a proved charge of abandonment at a time when such form of withdrawal was in force operated as an unlawful and wrongful deprivation of the rights of a homestead entryman under the law of the land. Out of this egregious error arises the fallacious and mischievious legal theory that in a case such as was made by the pleadings in No. 495 the sole inquiry is as to a matter of fact, to wit, whether the person whose homestead entry was canceled upon a charge of abandonment during continuance of a first form withdrawal was in occupancy of the land in question, or had abandoned same, at the time of abatement of the first form withdrawal and restoration of the land to the public domain.

It is only upon the assumption, a strained and violent one, that the views of the Circuit Court of Appeals as to the meaning of the 5th Section of the Act of June 27, 1906, are correct, that it can be said of No. 495 that "the case as presented here turns essentially on questions of fact." Upon such assumption the material questions of fact would be whether at time of discontinuance of the first form withdrawal and restoration of the land to the public domain, regardless of all matters of fact pertaining to the land theretofore, the land was or was not indeed abandoned by the claimant thereof under the homestead entry which had been canceled theretofore. *There is no other conceivable theory for regarding No. 495 as a case which, in this court, "turns essentially on questions of fact."*

Neither in the pleadings in No. 495, nor in the evident

purpose of the evidence adduced on either side, is there anything carrying the slightest indication or intimation of an understanding by the parties or by their counsel that the case is one determinative on its merits with reference to questions of fact. With equal positiveness and certainty we assert that there is not anywhere in the language of the opinions of the district and appellate courts a single statement indicative of entertainment by those courts of a thought that any of the issues presented in the proceeding rested upon a determination of questions of fact.

Since rendition of the appellate court's opinion in No. 495, 249 Fed. 562, and because of the many and menacing errors of law commited in that opinion, notably the observation therein that "we assume that the act of June 27, 1906, was overlooked, or its meaning misunderstood when the officers of the Land Department held that the plaintiff had abandoned his homestead entry," many titles resting upon many patents issued by the Land Department during the past fifteen years have been unsettled and actually questioned by such proceedings in the courts as were instituted by the appellee in No. 495 and the petitioners for certiorari in Nos. 291 and 292. *If it be true that he said act "was overlooked, or its meaning misunderstood' by the Land Department, it is perfectly obvious from the standponit of the public interests that his court should expressly so declare, and at an early date. On the other hand, if there be absolutely no merit in the very harsh criticism of the Land Department which is expressed in the said observations by the said appellate court, it is clearly obvious from the standpoint of the public interests that his court should expressly so declare and at an early date.*

At this time, and because of the wide spread notion that this court's affirmance in No. 495 is an emphatic approval of and concurrence in said appellate court's observation that

the said act of 1906 "was overlooked, or its meaning misunderstood" by the Land Department, numerous suits similar to numbers 495, 291 and 292, have been instituted or are in contemplation. That there has been encouragement of such suits by this court's opinion in No. 495 is due to the popular inference from said opinion that therein it was affirmatively held, in harmony with the views of the appellate court as to the meaning and effect of the 5th section of the act of June 27, 1906, supra, that the said act rendered abandonment of homestead entries during continuance of a first withdrawal permissive, rendered cancellation of such entries upon proof of abandonment during such period in contest proceedings before the Land Department ineffective and invalid and left for determination by the courts only the question of face whether the claimants under such entries had abandoned them at time of abatement of the withdrawal and restoration of the lands to the public domain.

IDENTITY OF THE QUESTIONS IN NOS. 291, 292 and 495 AND THE PROPRIETY OF CONSIDERATION OF THE PETITION FOR REHEARING IN NO. 495 IN CONJUNCTION WITH THIS MOTION TO ADVANCE

The motion to dismiss or affirm in No. 495 was presented by counsel who are the same counsel for petitioners in Nos. 291 and 292. At no place in the said motion is there the slightest reference to the pendency in this court of Nos. 291 and 292. Certainly such a reference would have apprised the court that whatever action it might take under said motion in No. 495 would possibly have an effect on its deliberations and decisions in Nos. 291 and 292. We assume that the court neither considered nor took actual notice of Nos. 291 and 292 in passing on said motion in No. 495.

The extent to which, if at all, the affirmance in 495 is decisive of any question of law in Nos. 291 and 292 is dependent entirely upon the action this court takes on the petition for rehearing in No. 495, for if that petition be denied, the denial will necessarily rest upon adherence by this court to its conclusion, heretofore announced, that No. 495 "as presented here, turns essentially on questions of fact." That announcement, as it seems to us, is without any basis in the record in No. 495, unless the basis therefor be stated as being that the Circuit Court of Appeals correctly concluded that the Act of June 27, 1906, supra, relieved homestead entries from contest during the period of continuance of a first form withdrawal and that, therefore, the only question presented was the single question of fact, to wit, whether the evidence in No. 495 showed that the appellee therein had abandoned his land at the time of abatement of the withdrawal and restoration of the land to the public domain. If that should be stated as the basis for denial of the petition for rehearing in No. 495 it would necessarily follow, we think, that the decrees of the Supreme Court of the State of California in Nos. 291 and 292 would be reversed for the reason that the demurrer to the complaint in No. 291, as well as the demurrer to the complaint in No. 292, admitted that the plaintiff in each of those cases had not abandoned the land he claimed therein at time of abatement of the withdrawal and restoration to the public domain but was at that time, at least, in occupancy thereof. (R. 10 in 291, and R. 3 in 292).

This court will not assume in either of these three cases to review the findings of fact made in the decisions of the Land Department in the contest proceeding which resulted in cancellation of the homestead entry referred to in the case, and if that be certain then, inevitably, whatever questions of fact may be inquired into and determined by the judiciary

in any case of like character must be questions of fact relative to matters arising after termination of the several contest proceedings and subsisting at time of abatement of the first form withdrawal and restoration of the land to the public domain. *Such questions or matters of fact can be material only in the event that the conclusions of law announced by the Circuit Court of Appeals in No. 495 are sound.* Up to this time this court, insofar as we have been able to determine from its decisions, has never yet passed on any of those questions.

We had hoped to have it pass on those questions in its action on our appeal in No. 495. But probably due, as we pray the liberty to suggest, to error committed in deducing from the rather involved and confused record in No. 495 the true character of the issues therein, an error to which counsel for appellant might have contributed by withholding from the Court whatever assistance an answer by him to the motion to dismiss or affirm would have afforded, we are constrained by duty to our client and not less to the court to seek a decision in accordance with the true issues in No. 495 under a petition for rehearing in that case.

A comparative study of Nos. 291, 292 and 495 discloses the wide divergence of opinion between the Supreme Court of the State of California as set out in the opinions in Nos. 291 and 292 and the opinion of the Circuit Court of Appeals for the Ninth Circuit as set out in No. 495. All of the questions of law in Nos. 291 and 292 were decided by the said court in accordance with views thereon *which are consistent with the uniform rulings of the Land Department* and which are the antithesis of the views expressed on the very same questions of law by the Federal district and appellate courts in No. 495. *It was undoubtedly this wide divergence of views on precisely the same questions of law that persuaded and induced this court to grant the writs of certiorari to the state court in Nos. 291 and 292.*

In the petitions for certiorari in Nos. 291 and 292, four district grounds or reasons for allowance of the writ were set out, the first of them being that the opinions of the state court to the effect "that the respondent could and did secure a preference right to the land in controversy under the act of May 14, 1880 (21 Sta. 141), which right took effect after said land had been restored from the Reclamation withdrawal, is in direct conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Edwards vs. Bodkin, 249 Fed. 562, 568." *Edwards vs. Bodkin is No. 495 in this Court and presents the identical questions of law referred to in the first of the stated grounds or reasons for certiorari in No. 291 and 292. See the second of the errors assigned on the appeal to this court in No. 495.* (R. 88 in *No. 495*).

The second of the stated grounds for certiorari in No. 291 and 292 is that the Secretary of the Interior is without authority of law to provide by regulation or otherwise that a contestant may exercise his preference right of entry "thirty days after the land shall have been restored from the reclamation withdrawal under which it was at the time of the contest or at the time of the cancellation" of the entry contested. The State court held in Nos. 291 and 292 that the Secretary possessed due authority to make such administrative regulations. The Circuit Court of Appeals held in No. 495 that the Secretary was without such authority. *The second and third of the errors assigned in No. 495 (R. 88) challenge the correctness of that holding by said court. If Nos. 291 and 292 are rightly here on certain questions of law, it is impossible, we think, for No. 495 to be here otherwise than upon the same questions.*

The third of the stated grounds for certiorari in Nos. 291 and 292 is that the regulations of the Land Department of January 19, 1909, 37 L. D. 365, terminated, ipso facto, all the rights of a successful contestant. The State Court in

Nos. 291 and 292 rejected that contention but the Federal Court in No. 495 sustained it. *The third of the specifications in the assignment in No. 495 (R. 88) alleges error on the part of the Federal Court in sustaining said contention. The identity of the questions in Nos. 291, 292 and 495 seems to us to be beyond all doubt.*

The fourth, and last, of the stated grounds for certiorari in Nos. 291 and 292 is that the decedent of the petitioner for certiorari was an actual settler at time of revocation of the withdrawal and therefore was entitled to entry as against one "who relied entirely upon the alleged preference right aforementioned." The State Court in Nos. 291 and 292 rejected that contention but the Federal Court in No. 495 sustained it. *The fourth, fifth and sixth of the errors assigned in No. 495 (R. 88) challenge the correctness of the Federal Court's action. We respectfully submit that it cannot be successfully contradicted that the questions in the said three cases are identical and are questions of law purely.*

If this Court did not conclude, in agreement with the Circuit Court of Appeals, that the said Act of 1906 rendered abandonment of reclamation homesteads permissive during the period they were affected by a withdrawal under the reclamation act, and that, therefore, the question before the trial court and in the upper court was necessarily only one of fact, to wit, was Edwards in occupancy of the land after discontinuance of the withdrawal and at time of restoration, we say, with the utmost respect and sincerity, that it is inexplicable to us how this court could have concluded on the record before it that "the case as presented here turns essentially on questions of fact."

We take the liberty of remarking that the Supreme Court of California in Nos. 291 and 292 found it impossible to follow and adopt the reasoning of the Circuit Court of Appeals as to the meaning of the said act of 1906. The State Court rejected the Federal Court's construction of

that statute as completely as it rejected the Federal Court's views that the regulations of the Department of the Interior of 1905 were invalid. A word as to those regulations, for it is around them that all the controversy has ever revolved.

The dominant questions in Nos. 291, 292 as well as in No. 495, are these:

First, Had the Secretary of the Interior the authority, with respect to public lands which have been withdrawn in aid of the purpose of the Reclamation Act of June 17, 1902 (32 Stat. 388) to prescribe regulations (6th and 7th paragraphs of the Instructions of June 6, 1905 (33 L.D., 607, at 608 and 609) as to the preference right of entry of a successful contestant under the act of Congress of May 14, 1880 (21 Stat. 140), which provide that "when an entry for lands embraced within a withdrawal under the first form is canceled by reason of contest" * * * "any contestant who gains a preference right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry."

As to the foregoing question the Circuit Court of Appeals, in its first decision in No. 495, 249 Fed. 562, at 568, see also the eighth paragraph of the syllabus, held that the said regulations were tantamount *to an amendment*, a modification or change of the act of May 14, 1880, supra, and therefore were invalid. This view was adhered to as the "law of the case" in the second opinion of said court in No. 495 (R. 85). In discussing the same regulations the Supreme Court of California in Nos. 291 and 292 expressly upheld them as lawful and reasonable (R. 25, in No. 291).

Second, Did the regulations of the Land Department of January 19, 1909 (37 L. D., 365) nullify a preference right of entry acquired as the fruit of a successful contest against a homestead entry under the terms of the provisions of the regulations of the said department of June 6, 1905?

As to the foregoing question the Circuit Court of Appeals, in its first decision in No. 495, 249 Fed. 562 at 569, said that "we are of opinion that whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909." As to the same question the State Court very properly cited and followed the decisions of the Land Department to the effect that the regulations of 1909 did not operate to work such a forfeiture of an earned and accrued statutory right (R. 25 in No. 291).

OUR APOLOGY FOR PROLIXITY

Patience on the part of the judiciary, a virtue essential to the administration of justice, has been trespassed upon here. There is, we hope, something extenuating in the fact that what appears herein, although not offered without a selfish motive, has been advanced in a cause making for early vindication in an opinion of this Court of certain long established and uniformly observed regulations and decisions of the Land Department, with resultant security and protection to many citizens who have taken title under patents to public lands which have issued in consonance with such regulations and decisions. Notice hereof has been served on petitioners' counsel in Nos. 291 and 292 and appellee's counsel in No. 495.

Respectfully submitted,

PATRICK H. LOUGHRAN,
Mills Bldg., Washington, D. C.
Counsel for respondents in Nos. 291 and 292 and for appellee in No. 495.

Washington, D. C., March 24, 1921,
Service of copy hereof on me is hereby acknowledged.
SAMUEL HERRICK,
Counsel for Petitioners in Nos. 291 and 292.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 291.

ARCHIE J. McLAREN, ADMINISTRATOR OF THE ESTATE OF JOHN McLAREN, DECEASED, PETITIONER,

vs.

L. G. FLEISCHER, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF ON BEHALF OF PETITIONER.

The Facts.

The quarter-section of land involved in this case was entered as a homestead in February, 1903, by one Charles W. Rider, but in September, 1903, was withdrawn under the first

form of the Reclamation Act of June 17, 1902 (32 Stat., 388), and remained so withdrawn for nearly seven years thereafter (R., p. 9).

During this time and on June 6, 1905, the Interior Department provided by instructions (33 Land Decisions, 607, 609) that:

> "Any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry" (R., p. 24).

In February, 1908, L. G. Fleischer, respondent herein, contested the Rider entry and through such contest secured its cancellation on January 26, 1909 (R., p. 9).

Prior thereto, and on January 19, 1909, the Interior Department issued the following general instructions (37 Land Decisions, 365) in lieu of that above quoted, namely:

> "No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest."

Notwithstanding these instructions, the local officers, on February 11, 1909, notified Fleischer of the cancellation of the Rider entry and that he would be allowed a period of thirty days after the restoration of the land within which to exercise a preference right (R., pp. 9, 10).

In January, 1910, the Secretary of the Interior directed restoration of this tract and other lands to public settlement on April 18, 1910, and to public entry on May 18, 1910 (R., p. 10). On the date first mentioned, John McLaren, under whom the petitioner here claims and who was fully possessed of all homestead qualifications, established settlement and actual residence upon the said quarter-section, and on May 18, 1910, filed proper homestead application (R., p. 10). Later the same day Fleischer filed homestead application without asserting any settlement right, but relying wholly on his alleged contestant's preference right (R., p. 10).

In the controversy which ensued from the filing of these conflicting applications, decisions were rendered by the different bureaus of the Interior Department in favor of Fleischer, though McLaren filed successive appeals and exhausted every remedy before the Department, until patent issued to his adversary in January, 1915 (R., p. 11). He also maintained residence upon the land with his family, cultivated it, and made improvements for a period of more than five years, or until ejected therefrom by judicial procedure on April 24, 1915 (R., pp. 10, 11, 13). Promptly thereafter he commenced action in the local courts of California to have a trust impressed on the land in his favor. Pending the outcome of this litigation he died and his administrator has been substituted as party in his stead (R., p. 18). After final decision against him by the Supreme Court of California (R., pp. 20-25), petition for writ of certiorari was filed in and granted by this honorable court, and the record has now come up for final action (R., pp. 27, 28).

ARGUMENT.

The question involved in this case, briefly, is whether or not a contestant's preference right of entry may be extended until thirty days after the land covered thereby has been restored from a first form reclamation withdrawal; and, of course, there is necessarily involved the question whether any valid contest can be initiated against an entry covering land included within such a withdrawal.

I.

The State courts have held in favor of such an authority in the Interior Department, but the Circuit Court of Appeals held directly to the contrary (Edwards *vs.* Bodkin, 249 Fed., 562; 265 Fed., 621), and the latter opinion has been affirmed by this honorable court in its decision rendered February 28, 1921, on a motion to dismiss or affirm (Bodkin *vs.* Edwards, No. 495, October Term, 1920).

The Supreme Court of California in its opinion here complained of (R., p. 25) dismisses the opinion of the Circuit Court of Appeals in a short comment, which, we submit, does not do justice to the reasoning of Judge Morrow nor apparently show full understanding of the same. We shall here quote at some length from that opinion, because, after citing section 2 of the act of May 14, 1880 (21 Stat., 540), and the 1905 regulations of the General Land Office (quoted *supra*), the learned judge held:

> "There are at least two objections to the application of these regulations to the defendant's contest. We do not find in the Reclamation Act any authority con-

ferred upon the Secretary of the Interior to so extend the limitation of the act of May 14, 1880. It is true he was authorized by section 10 of the Reclamation Act 'to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act (act June 17, 1902) into full force and effect.' But he was not authorized to amend, modify, or change the act of May 14, 1880, under which the defendant claims his preference right. But assuming, without so deciding, that this last-named act, construed in the light of the extension of time provided for in the act of June 27, 1906, authorized the Secretary of the Interior to give such instructions and to make such regulations, we are at once confronted with the second objection, based upon the fact that the regulations of June 6, 1905, relating to contested entries, were vacated before the defendant even attempted to make an entry under his supposed preferential right. The regulations of the Secretary of the Interior vacating the regulations of June 6, 1905, were issued January 19, 1909, and provided (37 Land Dec., 365) (quoted *supra*).

"These regulations went into immediate effect. If we hold that the Secretary of the Interior had the authority to make the regulations of June 6, 1905, we must also hold that he had the authority to make the regulations of January 19, 1909. If he had the authority to make, he had the authority to unmake. If he could amend or modify the statute in one case, he could do so in the other.

"When the regulations of January 19, 1909, were issued, no entry of the land had been made by the defendant. The withdrawal had been made before the termination of the contest and before entry by the defendant. The defendant had acquired no vested right to enter the land, but merely a preferred right of entry against every one except the United States.

> and this right, extended by regulation, might be terminated at any time. This was the decision of the Assistant Secretary of the Interior on February 17, 1909, in the case of David A. Cameron, 37 Land Dec., 450. We are of opinion that whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909."

The reasoning of Judge Morrow is cogent and cannot be dismissed in a few words, as the State court has attempted to do, especially when it has overlooked entirely his holding based upon the later regulations of the Department, adopted January 19, 1909. We will speak more of these later regulations *infra*.

The second section of the said act of May 14, 1880 (*supra*), provided that a contestant who had secured the cancellation of a homestead, pre-emption, or timber-culture entry shall be notified of such cancellation "and shall be allowed thirty days from date of such notice to enter said lands." This language is clear and unmistakable, and the words "thirty days from date of such notice" cannot be transmuted by any process into "one year, three months, and one week after such notice," as has been done by the State courts in the present instance; for, after receiving notice of the cancellation on February 11, 1909, Fleischer tendered no homestead application until May 18, 1910.

It is true that the Reclamation Act authorizes the Secretary of the Interior in general terms to make rules and regulations to carry it into effect, but this could not empower him to set aside an express provision of a previous act of Congress, passed on a different subject and which has not since been repealed or modified by any act of Congress. To so construe the later act would be to disregard the important rule of

statutory construction that repeal of a statute by implication is not favored (Potter's Dwarris on Statutes, 156; Sedgwick on Statutory Construction, 98; McCool *vs.* Smith, 1 Black, 470; "The Distilled Spirits," 11 Wallace, 356; State *vs.* Stoll, 17 Wallace, 430; Secretary Hitchcock's opinion in Edwin J. Miller, 35 L. D., 411).

The repeal of statutes by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed. It follows that where the intention not to repeal is apparent or manifest from an act, there is no room for repeal by implication, or the application of rules regarding implied repeal (36 Cyc., 1071, 1072, and cases cited).

In the words of Mr. Justice Story (Wood *vs.* United States, 16 Peters, 342, 363):

> "The question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication; for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

These words are particularly apt here, where we have for consideration the basic statute on settlement rights, on contests, and on relinquishments, namely, the act of 1880, and

the basic statute on reclamation, namely, the act of 1902. These subjects are wholly different, though, of course, both relating to the public lands, and it cannot be urged that the act of 1902 repealed the act of 1880 merely by virtue of the general authority in section ten to make rules and regulations any more than it repealed or modified all previous statutes relating to the public domain. It need hardly be argued that the mere authority to make rules and regulations under a law does not empower the Secretary of the Interior to modify or repeal previous laws passed by Congress on different subjects.

We therefore urge that the regulations of 1905, quoted above, were unauthorized and invalid and could not possibly result in the extension of a preference right of entry for thirty days—admitting for the purpose of argument that such a preference right ever existed here—into one of fifteen times that long.

II.

However, even though it should possibly be ruled that the regulations of 1905 were lawful and reasonable, the fact remains that they were recalled and abrogated by the Secretary of the Interior in 1909 before Fleischer had gained any preference right, and, accordingly, have no application to the facts of this case. There can be no doubt that if the Department had the authority to make the regulations of 1905 it was fully authorized to make those of 1909; or, in the language of Judge Morrow, "if he had the authority to make, he had the authority to unmake." These later regulations have been entirely overlooked by the State courts, hence the opinion of Judge Lawlor as to "what the Land Department has consistently held" (R., p. 24) is therefore wholly er-

roneous, and we believe it would be rather difficult to find any consistency between the regulations of 1905 and 1909, since they are directly contrary to one another. We do, however, find a consistency in the decisions of the Department on the subject of the time when a contestant's preference right of entry attaches, and also upon the manner in which that right may be withdrawn or the penalty remitted.

Secretary Hitchcock thus ruled in the leading case of Strader *vs.* Goodhue (31 L. D., 137, 138):

> "The preference right is not a right vested until a contestant has 'contested, paid the land office fees, and procured the cancellation' of the entry attacked. This is the plain wording of the acts of May 14, 1880 (21 Stat., 140), and July 26, 1892 (27 Stat., 270). The contestant's preference right is in the nature of a reward offered to an informer. The general rule as to the vesting of right under such statutes accords with the plain wording of this statute—viz., that the right does not become vested until judgment, and may be cut off (1) by a repeal of the statute (United States *vs.* Connor, 138 U. S., 61); (2) by a pardon (United States *vs.* Harris, 1 Abbott, U. S., 110; United States *vs.* Lancaster, 4 Wash., U. S., 64; Brown *vs.* United States, 1 Wool., U. S., 198); or by remission of the penalty by competent authority pending the proceedings (United States *vs.* Morris, 10 Wheat., 246)."

To the same effect are the decisions of the same Secretary and of subsequent Secretaries of the Interior in McCraney *vs.* Heirs of Hayes (33 L. D., 21, 24, 25); Stevenson *vs.* Scharry (34 L. D., 675, 678); Taylor *et al. vs.* Graves (36 L. D., 80, 82); Crook *vs.* Carroll (37 L. D., 513, 514); Virinda Vinson (39 L. D., 449).

In the leading case of Crook *vs.* Carroll (*supra*), the Department, after quoting the provisions of section 2 of the act of May 14, 1880, thus ruled:

> "The right given by this statute is in the nature of a reward to an informer, *and the statute must be construed strictly.* It is familiar law that an offer of reward conveys no right beyond the specific terms of the offer, *that it may be withdrawn at any time,* and that until something has been done to establish a right under the offer, a claimant takes nothing by reason thereof. 'Whoever claims under such an offer must bring himself within its terms. Failing to do that, his compensation is the consolation which comes to every citizen from the discharge of a public duty, which is the common obligation of all.' United States *vs.* Connor (138 U. S., 61, 65, 66)." (Italics are ours.)

The Department has gone further than this and has consistently held that even after a contestant's preference right has attached by reason of his success in the contest proceedings and the cancellation of the entry contested, the right of the United States may, during the thirty days after notice, intervene and prevent the exercise of such preference right, as, for instance, by a withdrawal of the land for forestry or other purposes (Jefferson E. Davis, 19 L. D., 489; William H. Schmith, 30 L. D., 6; Emma H. Pike, 32 L. D., 395; David A. Cameron, 37 L. D., 450). We merely refer to this as showing how erroneous is the construction of the Supreme Court of California as to what "the Land Department has consistently held."

The facts here are that the Rider entry was not canceled until January 28, 1909, but previously thereto, and on January 19, the Department had issued regulations which absolutely prevented the attachment of a preference right. In

other words, it amounted to a withdrawal of the offer of reward, and, accordingly, the action of the local officers in issuing Fleischer notice on February 11 was wholly unauthorized and invalid, and, of course, did not operate to create a right when same had previously been withdrawn by their superior officers.

We have argued this phase of the case as though Fleischer's contest against Rider were properly filed and as though he might have gained a preference right had not the regulations of 1909 issued before cancellation of the Rider entry. We believe, however, that in view of the provisions of the Reclamation Law the contest was erroneously and improvidently allowed; because the entry, covering lands within the limits of a first form withdrawal, was effectually suspended from any proceedings either upon or against it, and the contest, being thus invalid *ab initio,* could not possibly result in the acquisition of a preference right, even though the Interior Department had not by issuing the regulations of 1909 corrected its previous faulty position. Accordingly, by using the words "preference right" throughout this argument, we do not wish to be understood as admitting that such right ever existed in Fleischer, or that his contest was at any time a lawful and proper one.

III.

In conclusion, we suggest that the regulations of January 19, 1909 (*supra*), were in full force and effect when John McLaren settled upon the land and had been for fifteen months prior thereto; McLaren relied upon them, he was justified in so relying, and upon the faith of them and of their being ultimately recognized by the Department or the courts he has waged a ten-year fight for their enforcement;

and so have the other settlers in the companion cases, some of them suffering even criminal proscution and imprisonment in an effort to maintain their rights (Edwards and Culpepper *vs.* United States, 223 Fed., 309).

In addition, he resided upon the land, improved and cultivated it for a period of more than five years after entry, and, accordingly, gained title under Section 2297 of the Revised Statutes (Lawrence *vs.* Phillips, 6 L. D., 143).

The law deals tenderly with the rights of a settler on the public lands (Ard *vs.* Brandon, 156 U. S., 537, 543; Tarpey *vs.* Madsen, 178 U. S., 215, 221).

> "It is a well-established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him" (Lytle *vs.* Arkansas, 9 Howard, 314).

Accordingly, we respectfully urge that not only the law but the equities are with the petitioner, his decedent being both the prior applicant and the prior settler, while his adversary relies upon a mere paper right, which was in conflict with a positive act of Congress and had been declared non-existent by regulations of the Department of the Government charged with the administration of the public domain.

We therefore pray that the decision of the Supreme Court of California be reversed.

Respectfully submitted,

SAMUEL HERRICK,
HENRY M. WILLIS,
Attorneys for Petitioner.

INDEX.

PAGE

Statement 1

Argument 3

I. All the Legal Questions in Nos. 291 and 292 are Identical with some of the Legal Questions in No. 495 3

II. Lawlessness Results in the Conviction of Edwards, Appellee in No. 495, and of Culpepper, Petitioner, in No. 292, for Criminal Conspiracy to Intimidate Bodkin, Appellant, in No. 495. See 223 Fed. 309 . . 11

III. No. 495 was, Beyond Possibility of any Reasonable Doubt, in this Court not otherwise than on an Appeal from Rulings as to the Effect in Law of Facts as Agreed to, and of Uncontroverted Testimony. It was here virtually as Nos. 291 and 292 are here, i. e., on Admitted Facts and for Rulings as to Their Effect in Law 13

IV. Grievously Wronged Would be the Respondents in Nos. 291 and 292, if this Court's Decision of February 28, 1921, in No. 495, should be held to be Determinative of the Issues in their Cases 33

V. In the Petition for Rehearing in No. 495, as well as Herein, we show plainly that the Affirmance in No. 495 was due entirely to nothing else but the Easily Proven, if not Now Obvious, Misconception that said Case had been Presented Here on Questions of Fact 35

VI. McLaren and Culpepper could have Learned at the Land Office in Los Angeles, before they made their Settlements, of the Award of Preference Rights of Entry to Fleischer and Ocheltree 45

VII. The Ultimate and only Real Question in Nos 291 and 292 was the same Ultimate and only Real Question in No. 495, to wit, did a Settlement upon the Land which was Existent on April 18, 1910, Defeat the Pre-existent Preference Right which was Impossible of Exercise until May 18, 1910 46

VIII. The Department of the Interior is in fact a Public Land "Court," and as such has an Inherent Power, and it is its Duty to Prescribe just such Regulations as the Petitioners are Attacking in this Court . . 57

Conclusion 59

STATUTES.

Act of May 14, 1880, 21 Stat. 140 . . . 5, 6, 47, 50

Act of June 17, 1902, 32 Stat. 388 . . . . . 5, 47

Act of June 27, 1906 (5th Sec.), 34 Stat. 519, 520 . . 9, 10, 14, 23, 28, 34, 42

SUPREME COURT DECISIONS.

Bodkin *v.* Edwards, No. 495, October Term, 1920, decided February 28, 1921 3, 4, 8, 14, 15, 36 to 44

Cosmos Exploration Co. *v.* Gray Eagle Oil Co. 190 U. S. 301 59

Estes *v.* Timmons, 199 U. S. 391 58

Knight *v.* U. S. Land Assn. 142 U. S. 161 51

Lytle *v.* Arkansas, 9 How. 314 59

United States *v.* MacDaniels, 7 Peters, 1 56

United States *v.* Schurz, 102 U. S. 378 57

INFERIOR FEDERAL COURT DECISIONS.

Bodkin *v.* Edwards, 265 Fed. 621 . . . . . 24, 31
Edwards, *et al*, *v.* United States, 223 Fed. 309 . 11, 12
Edwards *v.* Bodkin, 241 Fed. 931 . . . . . 15, 16
Edwards *v.* Bodkin, 249 Fed. 562 . . . . . 3, 4, 7, 9, 10, 17, 26, 27, 41, 53
Edwards *v.* Bodkin, 267 Fed. 1004 3, 8, 17, 22, 24, 28

STATE COURT DECISIONS.

Culpepper *v.* Ocheltree, 185 Pac. 971 7
McLaren *v.* Fleischer, 185 Pac. 967 . . . . 2, 7, 8

LAND DEPARTMENT DECISIONS AND REGULATIONS

Beach *v.* Hanson, 40 L. D. 607 55
Brown *v.* Brown, 2 L. D. 259 50
Edwards *v.* Bodkin, 42 L. D. 172 55
Goodwin *v.* Goodin, 47 L. D. 298 40
John T. Slaton, 43 L. D. 212 55
Low *et. al. v.* Katalla Co. 40 L. D. 539 58
Moses *v.* Brown, 2 L. D. 260 50
Regulations of June 6, 1905, 33 L. D. 607 . . . . 9, 35, 47, 48, 49, 52
Regulations of January 19, 1909, 37 L. D. 365 . . 10, 27, 35, 53, 54
Regulations of August 24, 1912, 41 L. D. 171 . . 55
Regulations of September 4, 1912, 41 L. D. 241 . 55
Strader *v.* Goodhue, 31 L. D. 137 51
Wells *v.* Bodkin, 42 L. D. 340 . . . . . 39, 52
Wells *v.* Fisher, 47 L. D. 288 55

IN THE

Supreme Court of the United States.

October Term, 1920

ARCHIE J. McLAREN, Administrator of the Estate of JOHN McLAREN, Deceased, *Petitioner*,
v.
L. G. FLEISCHER.

No. 291.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT.

STATEMENT.

This case is here on certiorari to the Supreme Court of the State of California, and presents for decision the merits of a proceeding begun by the petitioner to have the respondent decreed to be a trustee for the former of the legal title to a tract of land which passed from the United States to the latter under a homestead patent issued by the Land Department.

The court of first instance was the Superior Court of Riverside County, California. The *original* complaint was filed August 28, 1915 (R. 1 to 3). A demurrer thereto being sustained, a *first amended* complaint was filed

November 18, 1915 (R. 4 to 7). A demurrer to such second pleading being sustained, a *second amended* complaint was filed December 23, 1915 (R. 8 to 14). From an order sustaining a demurrer to such third pleading, an appeal was taken on March 20, 1916, to the State Supreme Court (R. 16). The latter court, on December 1, 1919, 185 Pac. 967, filed its opinion in affirmance of the lower court's action (R. 20 to 25), and on December 29, 1919, denied a motion for rehearing (R. 19).

Thereupon this court was petitioned for a writ of certiorari. The petition was granted, the writ issued and the return thereunder was filed here June 15, 1920.

The cause was in the said Superior Court from August 28, 1915, until March 20, 1916—April 24, 1916 (R. 3 and 17). *But it was in the said Supreme Court from early in the year 1916 until December 1, 1919—January 2, 1920 (R. 17 and 26).* The reason for the seeming long pendency of the case in the State Supreme Court is not shown in the record in No. 291. It is a little more satisfactorily indicated in the record in 292, wherein, at pages 12 and 13, appears a stipulation executed *October 6, 1916*, submitting *both* cases in said Supreme Court "upon the briefs now on file therein." On June 17, 1919 (R. 18 in No. 291), the order submitting the *two* cases was vacated "for the purpose of giving leave to file additional briefs."

The probable real cause for the long pendency of the case in the State Supreme Court was that during the period of its pendency there the case of Edwards v. Bodkin (No. 495 in this court and entitled herein as Bodkin v. Edwards) was pending in the Federal Courts in California. *Reasonably certain is it that the order of the State Supreme Court of June 17, 1919, in Nos. 291 and 292, "giving leave to file additional briefs," was ob-*

tained by counsel, for the purpose of endeavoring to impress upon the mind of the State Supreme Court and to persuade it to approve, adopt and follow, the views the Court of Appeals announced through Circuit Judge Morrow on March 8, 1918, in Edwards v. Bodkin (249 Fed. 562) and which, perforce, District Judge Trippett effectuated in his decision of April 9, 1919, in the same case (267 Fed. 1004). But the State Supreme Court's opinion, 185 Pac. 967, and its denial of a motion for rehearing, evince anything but favorable notice or consideration of the views of the Court of Appeals or of the action District Judge Trippett thereafter was under compulsion to take, by reason of "the law of the case" doctrine.

ARGUMENT.

I.

ALL THE LEGAL QUESTIONS IN NOS. 291 AND 292 ARE IDENTICAL WITH SOME OF THE LEGAL QUESTIONS IN NO. 495.

This court's decision of February 28, 1921, in No. 495 has not only affirmed decisions which the Department of the Interior has wisely and justly refused, and will continue to refuse, to follow, because of an unsoundness therein that is palpable, but its affirmance thereof was made under the serious and extraordinary misapprehension that the decisions were rendered in cases that went to a hearing and determination on questions of fact.

That misapprehension, unless perceived by this court, will inevitably eventuate in numerous speculative and even champertous suits, and also cause the bench below and the bar, to the extent that the latter is familiar with No. 495, to be able to say, with absolute accuracy, that a case

which was heard and determined below upon very important questions of law exclusively, and which was brought here on questions of law exclusively, was, nevertheless (AND UNDER A MOTION TO DISMISS OR AFFIRM, WHICH FAILED TO SET OUT A SINGLE VALID REASON FOR GRANTING THE SAME, AND WHICH CONTAINED NOT THE SLIGHTEST HINT OR SUGGESTION THAT THE DECISIONS BELOW TURNED ON QUESTIONS OF FACT, AND WHICH WAS IGNORED BY BODKIN'S COUNSEL BECAUSE IT WAS PLAINLY FRIVOLOUS), decided here because of the unfounded assertion here, due to misappresension, that the decisions below turned on questions of fact.

Like two peas in a pod, separate entities but of the same substance, are the complaints in Nos. 291 and 292. They were drafted by the same hand, originated in the same brain, have the same number of paragraphs, contain the same prayers, are of the same length, are subscribed by the same learned counsel, and were filed on behalf of absent plaintiffs. *They will serve admirably as forms for use in many similar suits, should this court fail to make it evident that it did not by its affirmance of February 28, 1921, in No. 495, Bodkin v. Edwards, approve and confirm "the law of the case" as expounded by the Circuit Court of Appeals, speaking through Circuit Judge Morrow, in 249 Fed. 562.*

The *second amended* complaint in this case (No. 291), was verified by counsel for McLaren, because "the plaintiff is absent from the County of San Bernardino." The complaint in No. 292 was also verified by the same counsel on behalf of an absent client. From the said *second amended* complaint the following material allegations are gleaned, to wit:

A. One Charles W. Rider (who is in no wise at interest in this litigation) made a homestead entry of the land in suit on February 9, 1903 (R. 9).

B. The land so entered was withdrawn under "first form" on September 8, 1903, in aid of the purposes of the Reclamation Act of June 17, 1902, 32 Stat. 388 (R. 9).

C. February 18, 1908, Fleischer, the respondent here, filed a contest against the Rider entry (R. 9).

D. January 28, 1909, the General Land Office canceled the Rider entry under the Fleischer contest (R. 9).

E. February 11, 1909, the register and receiver of the United States Land Office at Los Angeles, California, notified Fleischer that by reason of his successful contest he had earned a right of preference of entry of the land in suit under the second section of the act of May 14, 1880, 21 Stat. 140, which he might exercise within thirty days after abatement of the "first form withdrawal" and after the land had been restored to public entry (R. 9 and 11).

F. The land was restored to settlement April 18, 1910, and to entry May 18, 1910 (R. 10).

G. April 18, 1910, McLaren, the petitioner here, made settlement on the land (R. 10).

H. May 18, 1910, McLaren applied for a homestead entry of the land (R. 10).

I. May 18, 1910, Fleischer applied for a homestead entry of the land in exercise of his said right of preference of entry (R. 10).

J. May 18, 1910, all applications were suspended pending a government inquiry as to the official survey of the land (R. 10 and 11).

K. May 22, 1912, such suspension was revoked (R. 11).

L. June 3, 1912, Fleischer's application for entry was allowed and McLaren's was rejected (R. 11).

M. Thereafter McLaren "exhausted all remedies" * * * in the Land Department "to secure his said right as a settler" (R. 11).

N. January 15, 1915, a patent for the land was issued to Fleischer under the entry which he was allowed to make on June 3, 1912 (R. 11).

O. That the officers of the land department "acted wrongfully and contrary to law" and prejudicially to McLaren in the premises, in that they refused to recognize the right he acquired by virtue of his settlement on the land on April 18, 1910 (R. 12).

P. That the conduct of the land department was "particularly contrary to the express terms of the act of Congress of May 14, 1880," supra, because, forsooth, the said department had held that Fleischer, by reason of his successful contest against the Rider entry, had earned a right to enter the land in preference over all others for a period of thirty days after May 18, 1910 (R. 13).

Q. That the several decisions of the land department in the matter "misapplied, misconstrued and misconceived the laws of the United States" applicable to McLaren's settlement on the land on April 18, 1910, and to Fleischer's successful contest against the Rider entry (R. 12).

R. That the alleged errors of the land department prevented McLaren from obtaining title to the land and led to the unlawful passing of title thereto to Fleischer (R. 13).

Here seems to be the appropriate place to show what the State Supreme Court perceived as the only difference worthy of notice between the facts in this case, No. 291, and the facts in No. 292. Said court made this observation:

"The only difference between the two cases is that the defendant herein (Ocheltree, in No. 292) received notice on January 13, 1909, that he had been successful in his contest and was awarded a preference right to enter the land within thirty days after it should be restored to entry. The defendant in McLaren v. Fleischer (No. 291) received a similar notice on February 11, 1909—the former notice coming within the time section 7 of the rules and regulations of the Land Department of June 5, 1905, were in force and the latter after section 7 had been superseded by section 6 of the Rules and regulations of January 19, 1909.

"In view of what we have said in McLaren v. Fleischer this difference in the time of receipt of notice is immaterial and therefore upon the authority of that case the demurrer herein is sustained.

"Judgment affirmed." (R. 14 in No. 292, 185 Pac. 971.)

The ultimate question in Nos. 291 and 292 was stated by the State Supreme Court (R. 23 and 24) to be this:

"The sole question, therefore, which is presented for determination here is whether the officers of the land department made a mistake of law in granting the defendant a preference right, in the recognition of which it became necessary to cancel plaintiff's entry" (i. e., to reject plaintiff's application to enter, for plaintiff had never been allowed an entry).

Of course the State Supreme Court felt constrained to notice in its opinion the previous rulings of the Circuit Court of Appeals, speaking through Circuit Judge Morrow, in Edwards v. Bodkin, 249 Fed. 562. In its notice and discussion of those rulings (R. 25, 185 Pac. 967) it said this:

"Appellant relies upon Edwards v. Bodkin, 249 Fed. 562, in support of his claim that the preference right was awarded to the respondent through a mistake of law. The decision there was not to the effect that the contestant was by mistake of law given the

> preference right. *It was there held that the Commissioner of the General Land Office had* MISTAKEN THE LAW *in declaring* that the settler had abandoned his homestead claim." (Capitals and italics supplied.)

When it is clearly in one's mind that the State Supreme Court's opinion, 185 Pac. 967, was filed December 1, 1919, and that said date was about eight months subsequent to District Judge Trippett's decision of April 9, 1919, and about five months subsequent to the said District Judge's decision of July 24, 1919, on rehearing, in Edwards v. Bodkin, 267 Fed. 1004, *it will be as obvious as the existence of Deity that the State Supreme Court never intended that its opinion should be understood as containing a statement to the effect that the Federal Courts, in Edwards v. Bodkin, had actually reviewed the testimony taken in the contest proceeding between Bodkin and Edwards in the Land Department and had found that such testimony was without any, or legally sufficient, evidence to sustain the findings of fact the Land Department had made in that proceeding and, therefore, that said Department had "mistaken the law."*

Nor will one who reads intelligently the opinion of the State court conclude therefrom that said court believed, as this court in its decision of February 28, 1921, in No. 495, said it believed, that the Federal Courts had decided Edwards v. Bodkin because those courts had found that the Land Department had not considered matters presented to it by Edwards, which it should have considered. In short, the State court apprehended what was the actuality, viz, that the Federal courts in effect had conceded that THE LAND DEPARTMENT HAD NOT MISTAKEN OR MISSTATED THE FACTS, BUT HAD "OVERLOOKED" OR "MISUNDERSTOOD" THE EFFECT THEREOF IN LAW.

The State tribunal's utterance reflected a truly scientific appreciation of the rationale of the views of the Federal courts. *It actually knew that what the Federal Courts had said was this, that the 5th section of the act of June 27, 1906, 34 Stat. 519, 520, relieved homestead entries from contest upon charges of abandonment and that the Land Department had "misunderstood" or "overlooked" that legislation* AND, THEREFORE, HAD MISTAKEN THE LAW WHEN IT PERMITTED BODKIN TO INITIATE AND MAINTAIN HIS CONTEST AGAINST EDWARD'S ENTRY.

Courtesy possibly inspired the State Supreme Court to desist from express dissent by it from those other rulings of the Federal courts in Edwards v. Bodkin which, if the State court had deemed them sound and followed them, would inevitably have caused the State court to hold and decide entirely to the contrary of what it did hold and decide. For instance, in 249 Fed. 562, 567, it was expressly ruled that the Interior Department's regulations of June 6, 1905, 33 L. D., 607, were invalid to the extent that they provided for the exercise of a contestant's preference right at any time within thirty days after restoration of land to entry. Those regulations, as the Federal Court said, were tantamount to an attempt "to amend, modify or change the act of May 14, 1880."

The same regulations were before the State Court and were discussed by it in Nos. 291 and 292 (after they had thus been condemned by the Federal Court) but the State Court held that they were lawful and reasonable. If the contrary of that had been the State Court's holding then, of course, said court and the Federal Court would have been in agreement, and there could not have appeared in the petition for certiorari which was filed in this court in Nos. 291 and 292 this observation, to wit:

> "that the opinion of the highest court of the State of California in this cause, holding that the respondent could and did secure a preference right to the land in controversy, under the act of May 14, 1880, 21 Stat. 141, which right took effect after said land had been restored from the reclamation withdrawal, is in direct conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Edwards v. Bodkin, 249 Fed. 562, 568" (pp. 2 and 4 of the petition for certiorari in No. 291).

Nor did the State Court find it possible to abide the conclusion of the Federal Court, 249 Fed. 562, 569, to the effect "that whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909," 37 L. D., 365. *It is very likely that the State Court instantly perceived the force of the proposition that if any statute right whatsoever had been acquired, it was utterly incompetent for the Land Department, by a regulation, to destroy or nullify it.*

From the foregoing it must be apparent that the only legal questions in No. 495 which are not also present in Nos. 291 and 292 are these, to wit:

A. Was the Federal Court accurately stating the law when it said, 249 Fed. 562, 566, that an affidavit of contest which is in fact executed on information and belief, but which appears to have been executed on personal and actual knowledge, "insufficient to initiate a contest," notwithstanding corroboration thereof by a person deposing on personal and actual knowledge. (See pages 34 and 35 of Record in No. 495 for a copy of the affidavit of contest Bodkin filed against Edward's entry.)

B. Was the Federal Court faithfully interpreting the law when it said, 249 Fed. 562, 567, that the 5th section of the act of June 27, 1906, supra, relieved homestead entries from contest and cancellation for abandonment?

II.

LAWLESSNESS RESULTS IN THE CONVICTION OF EDWARDS, APPELLEE IN NO. 495, AND OF CULPEPPER, PETITIONER IN NO. 292, FOR CRIMINAL CONSPIRACY TO INTIMIDATE BODKIN, APPELLANT IN NO. 495. SEE 223 FED. 309.

The complaints in Nos. 291 and 292 represent that the plaintiffs in those cases resisted the rulings on their claims which were made by the Land Department, even to the extent of remaining in possession of the lands claimed by them, respectively, until removed through legal processes obtained in possessory actions instituted by the defendants (R. 13, in No. 291 and R. 3, in No. 292). But it is not stated in the complaint in No. 292 that the plaintiff in that case was indicted, tried and convicted for conspiracy with Edwards, the plaintiff below in No. 495, to intimidate Bodkin, the defendant below in No. 495, in the enjoyment of a right secured under the laws of the United States. However, it is admitted in Edwards' complaint in No. 495, in language abusive of all officers of the law who afforded the protection of the law to Bodkin, that he, Edwards, was convicted of and imprisoned for said offense (R. 8 in No. 495).

The said two defendants in the said criminal action obtained a review by the Circuit Court of Appeals of the judgment of conviction. They were represented in the criminal action by the same attorneys who appear for them in the civil actions they instituted, respectively, and which civil actions (Nos. 292 and 495) have come before this court. The essence of their defense in the criminal action, as is inferrable from the decision of the said Court of Appeals affirming the conviction, 223 Fed. 309,

was that Bodkin had not acquired a preference right of entry by reason of his successful contest against Edwards' entry; that Bodkin had not become entitled to an entry of the land, and that the only one entitled to entry of the land and to possession thereof was Edwards.

The said criminal action was reviewed in said Court of Appeals upon an exception to an instruction given by the trial court, "as well as the refusal of the court to give an instruction embodying the opposite view of the law," 223 Fed. 309, 311. The instruction given was that "Bodkin, by virtue of the allowance of June 1, 1912," * * * "of his application previously filed" * * * "to enter as a homestead," * * * "acquired the right" * * * "to make settlement and residence upon said land." In the argument on behalf of the convicted conspirators it was contended, in substance, that the allowance of an entry in the exercise of a successful contestants' preference right *"long after the 30-day notice required by law*, but after the restoration of said lands to entry" did not "confer such a right as is embraced within the terms of section 19 of the Penal Code of the United States."

After stating that the record before it did not disclose the date of cancellation of Edward's entry, nor the date of the notice to Bodkin of his accrued right of a preference of entry, the Court of Appeals, "finding no prejudicial error in the record," affirmed the judgment of conviction. *The record in No. 495 in this court shows that Edward's entry was canceled April 19, 1910, which was after abatement of the first form withdrawal and after execution of the order of restoration of the land to the public domain, and that the notice to Bodkin of his preference right was given subsequent to that date* (R. 49 in *No. 495*). *Therefore Bodkin's preference right application, which was filed May 18, 1910, was actually filed*

within the thirty days allowed by law for its filing. (R. 55 in No. 495.)

Is it not a moral certainty that those facts were well known to the conspirators and to their counsel at all times during and after the trial of the criminal action? If so known, was the Court of Appeals aided or its labors increased, by an argument from counsel which contained the assertion that:

> "*The question raised*, briefly stated, is: Is the action of local land officials in permitting and receiving the filing of a homestead application, based solely upon a preference right of entry, theretofore awarded to the applicant by the Land Department at the successful termination of a contest of an entry upon lands, *while withdrawn from all form of public entry under the Reclamation Act*, and the allowance by the local land officials of such homestead entry upon such preference right, *long after the 30-day notice required by law*, but after the restoration of said lands to entry, within the jurisdiction of the land officials, and does such action confer such a right as is embraced within the terms of section 19 of the Penal Code of the United States?" (Italics supplied.)

III.

NO. 495 WAS, BEYOND POSSIBILITY OF ANY REASONABLE DOUBT, IN THIS COURT NOT OTHERWISE THAN ON AN APPEAL FROM RULINGS AS TO THE EFFECT IN LAW OF FACTS AS AGREED TO, AND OF UNCONTROVERTED TESTIMONY. IT WAS HERE VIRTUALLY AS NOS. 291 AND 292 ARE HERE, *i. e.*, ON ADMITTED FACTS AND FOR RULINGS AS TO THEIR EFFECT IN LAW.

In adjudicating the Bodkin-Edwards case, this court erroneously supposed that it had been adjudicated in the courts below upon a finding by the courts below that the Land Department had not considered matters presented to it by Edwards, which it should have considered. But there not having been any such adjudication below in said case, *and the record in said case showing clearly that the Land Department had heard and re-heard everything Edwards had ever presented to it*, we respectfully submit here for the consideration of this court the proposition, that its affirmance of February 28, 1921, in No. 495 cannot from any truly scientific and logical viewpoint, although it might upon the basis of technicalities and fictions unknown to us but which jurisprudence possibly recognizes and enforces, be regarded and treated by bench and bar otherwise than as an unqualified approval and unreserved confirmation by this court of the views of the courts below on the matters of law which those courts held were *controlling* in No. 495.

In other words, as the courts below very clearly and painstakingly indicated that their decisions against Bodkin were based solely upon their rulings that he had never initiated a contest in the Land Department, because (1st) his affidavit of contest, although not so appearing, was executed on information and belief, and (2nd) that, even if it had been executed on personal knowledge, the affidavit of contest could not be allowed because, forsooth, the 5th section of the act of June 27, 1906, 34 Stat. 519, 520, forbade a contest—we submit that it is logically impossible for this court's decision of February 28, 1921, to have been an affirmance, without also and necessarily having been the effective means whereby Bodkin has been deprived of his property and Edwards invested with the title thereto owing to nothing else but the views of the

courts below on questions of law exclusively. *It is inescapable, we think, that this court has fully concurred in and completely committed itself to such views on matters of law.* BUT THE SUPREME COURT OF THE UNITED STATES WOULD NOT THUS HAVE COMMITTED ITSELF TO DEMONSTRABLE FALLACIES IN LEGAL REASONING IF IT HAD NOT MISCONCEIVED THE CHARACTER OF NO. 495.

IN OUR DEMONSTRATION OF THE FALLACIES WHICH THE SUPREME COURT OF THE UNITED STATES HAS, INADVERTENTLY, CAUSED TO BE TREATED AS VERITIES, WE WILL HERE REVIEW THE HISTORY OF BODKIN V. EDWARDS. District Judge Bledsoe's decision in 241 Fed. 931 discusses Edwards' complaint (the one in No. 495) with thoroughness. Said decision held that the malicious onslaughts by the maligning Edwards upon Department of the Interior officials and upon Department of Justice officials (vide paragraphs 2, 5, 12, 14, 15, 17, 20, 22, 23, 26, 32, 33 and 34 of the complaint at pages 2 to 10 of the R. in No. 495) were "most general and inconclusive assertions with respect to fraud" and afforded no basis for judicial inquiry as to whether "any fraud was actually committed or that any mistake of law in the overruling of the plaintiff's protest was indulged in" by the Land Department, or as to whether any mistake or misstatement of fact was made by said department in its findings in the contest proceeding. *Judge Bledsoe understood that the sole alleged ground for revision and change by the judiciary of the Land Department's findings in the contest proceeding was fraud on the part of officers of that Department in making the findings, and that no alle-*

gation in the bill of complaint (in No. 495) *was of a character warranting judicial inquiry as to those findings with view to determining whether they should be revised.*

As to the issue of law in the case the said Judge remarked:

> "The main question in the case centers around the right of the Department of the Interior to allow the preferential right inuring to the successful contestant of an entry upon public lands to attach and be taken advantage of after the lands have been restored to entry subsequent to a 'first form' withdrawal under the act of June 17, 1902, 22 Stat. 388." 241 Fed. 931, 933.

Judge Bledsoe's views on that issue of law were expressed thus:

> "In my judgment, the action of the Department in holding that the right accrued as of the date of restoration of the land to the public domain was a correct application of the law in the premises." 241 Fed. 931, 934.

The report of Judge Bledsoe's opinion in the Federal Reporter does not show that he expressly stated therein that Edwards might amend his complaint. Ordinarily an amendment would be permitted. By electing to appeal (if there was election owing to no express or implied refusal to allow an amendment of the complaint), Edwards chose to stand on his pleading. *Whether that pleading duly presented any question of fact whatsoever which the judiciary could properly regard as entitling Edwards to a decree was clearly decided in the negative by Judge Bledsoe.*

The last two paragraphs of the opinion of the Court of Appeals on the appeal to it *from Judge Bledsoe's rul-*

ing, which opinion was delivered by Circuit Court Judge Morrow, 249 Fed. 562, 570, 571, are these:

> "The motion to dismiss was made on the ground that the complaint does not state facts sufficient to constitute a cause of action. We think the complaint is not so defective as to justify its dismissal. It does state facts sufficient to constitute a cause of action, but the facts are imperfectly stated, and with respect to the proceedings in regard to the defendant's lieu land selection are not fully stated.
>
> "The judgment is reversed, with direction to deny the motion to dismiss, and with leave to plaintiff to amend his complaint, if so advised."

WHEN THE CASE CAME AGAIN BEFORE THE DISTRICT COURT, DISTRICT JUDGE TRIPPET VERY WISELY REMARKED THAT "UNDER THE DECISION OF THE CIRCUIT COURT OF APPEALS (249 FED. 562) HE (BODKIN) HAD NO RIGHTS TO BE CONSIDERED." 267 FED. 1004, 1009.

It is of first importance that we inquire diligently here as to what it was that influenced Judge Trippet to say that the decision in 249 Fed. 562 was an adjudication that Bodkin "had no rights to be considered." In such inquiry the first matter for ascertainment is the true character of the grounds upon which Edwards rested his bill of complaint, for it was with respect to those grounds, and with respect to them alone, that the Court of Appeals decision on the appeal from the order dismissing the complaint so expounded the law as to leave Bodkin without any rights to be considered.

Edwards' complaint was grounded entirely upon the proposition that the homestead entry he made on December 1, 1902, was not lawfully canceled on Bodkin's con-

test because, forsooth, *the Land Department was without authority of law to permit a contest proceeding against it.* (Pars. XI and XX of complaint, at pages 4 and 6 of the R. in No. 495, respectively). His complaint rests his case upon whatever rights continued in him under his entry, despite the cancellation thereof by the Land Department. This is evident from these allegations of Edwards' complaint (references being to the record in No. 495), to wit:

A. That he made homestead entry December 1, 1902 (R. 1).

B. That he made a final proof under the entry on April 23, 1909, which he alleges the Land Department refused to consider. (Such alleged proof was made after hearing in the contest, and after decision therein by the Register and Receiver. R. 37. The department fully considered the proof, R. 50 to 52.)

C. That the Land Department promulgated regulations in 1905 governing the contesting of homestead entries of land within reclamation withdrawals, which were violative of law (R. 4).

D. That Bodkin's affidavit of contest was executed on information and belief (R. 5).

E. That Edwards was upon the land when served with notice of Bodkin's contest (R. 5).

F. That *"at the hearing of said contest if was found, conceded and established* WITHOUT DISPUTE that plaintiff had established residence, had made improvements," et cet. (This allegation is obviously false in the light of the decisions of the Land Department in the contest. R. 37 to 43.)

G. That before actual cancellation of his entry on the Bodkin contest, the Interior Department, in 1909, promulgated a regulation which provided "that in all cases where

contest had been allowed, if preference right had not been used thereunder, such regulation would ipso facto terminate all right futurely promised by the prior (1905) regulations" (R. 5 and 6).

H. That on June 1, 1912, the Land Department allowed a homestead entry to Bodkin "solely because of the bias and prejudice aforesaid" (R. 6).

I. That the department denied him due process in his contest against Bodkin's preference right homestead entry (R. 9). The fact is that the department duly heard the said contest (R. 53).

J. That Edwards protest against Bodkin's "scrip" locations was arbitrarily denied. (R. 9. The fact is that the department duly heard the protest. R. 59 to 64.)

Some of the matter which Edwards thrust upon Judge Trippet's notice in an attempt to prove such of the foregoing allegations as are not statements of conclusions of law, was deliberately omitted from the record in this court in No. 495, with the passive or tacit, if not active or express, approbation of counsel for Edwards who, by not specifying it in his praecipe for the record, seemed to us, at least, to have *agreed with us that it was utterly without materiality under any allegation of fact in his client's complaint as well as utterly detached from and foreign to the basis, or any part of the basis, for the conclusions reached by Judge Trippet and the rulings thereafter made by the Court of Appeals, when it spoke through District Judge Wolverton.*

The matter or "evidence" omitted from the record in No. 495 in this Court was the testimony taken in the contest proceeding between Bodkin and Edwards in the Land Department, the colloquy between counsel and Judge Trippet before such testimony was put in, copies of the pleadings and notes of the proceedings in the State

Court in the possessory actions and the copies of the three patents that issued to Bodkin. (The propriety of a reference by us here to what was omitted from a record in another case in this court could be questioned, if the other case were not one which, as we sincerely believe, this court might desire that we discuss here in view of our petition for rehearing therein. We have filed in the office of the Clerk of this court a certificate by the Clerk of the Court of Appeals as to every word and figure omitted from the record in this Court in No. 495.)

We do not intend to discuss the obvious in this court. Therefore we shall not dilate on the uselessness, in a judicial sense, of the presence in a record of a case of the nature of No. 495, of the copies of the patents to Bodkin and of the matter relative to the possessory actions. *But we must, because it is not less our duty to this court than to our clients in Nos. 291 and 292, make it indisputably clear that there were valid reasons for omitting from the record in No. 495 the testimony which was taken in the contest between Bodkin and Edwards in the Land Department.*

Why the testimony taken in the contest proceeding between Bodkin and Edwards in the Land Department was omitted from the record in No. 495 will become apparent upon reflection on these facts:

A. Nowhere in the bill of complaint in No. 495 will there be found a single allegation that the Land Department's findings of fact were without any evidence whatever to support them.

B. Nowhere in said bill of complaint will there be found a single allegation that Bodkin, or anyone else, committed a *specified* act in fraud upon the Land Department that resulted in the obtaining from it of the findings of fact it made.

C. Nowhere in said bill of complaint will there be found a single allegation of a fact which, if true, would show that Edwards was denied a day in court in the contest proceeding, or was denied due process in any particular.

D. Nowhere in said bill of complaint will there be found a single allegation that the facts as found by the Land Department and accepted as the facts in the case, are wholly insufficient in law to sustain a ruling thereon that there had not been the residence upon the land and the cultivation thereof by Edwards *that the statutes required in 1907 to 1911 in the maintenance of the ordinary homestead entry.*

The only possible basis which the courts below could find, or this court can find, for reviewing the Land Department's findings of fact are the allegations in Edwards' complaint that the many Land Department decisions against him and other fancied wrongs were due to Bodkin's "friendly relations with certain Land Department officials (R. 5), to "the assurances given the defendant and in aid of his speculative program, department officials decided that abandonment was proved" (R. 5), to "field agents of the department" * * * "making wrong reports concerning plaintiff and showing partisan zeal in many ways" (R. 5), to "a conspiracy" between Land Department officials, Department of Justice officials and others (R. 7), to oppression and coercion from a United States Attorney (R. 7), to intimidation of a local court by a United States Attorney (R. 8), to "manufactured evidence" (R. 8), to "discrimination against him in proceedings before the Land Department" (R. 9), to "bias and prejudice culminating in a conspiracy" (R. 10), to "the most extreme prejudice and partisan intent" (R. 10), and to "the voluntary and involuntary fraud to which plaintiff has been subjected" (R. 10).

Those serious charges were made against the very officers of the Land Department who, throughout several years, patiently heard, painstakingly considered and calmly and impartially determined the many and varied attacks which Edwards had made, in actual abuse of the processes of the Land Department, against Bodkin. *But not the slightest attempt was made to substantiate those serious charges. Judge Trippet, doubtless deeming it but an act of simple justice to the said officials of the government, made this observation:*

> "The plaintiff offered no proof regarding the misconduct of any of the officers of the Land Department" (R. 74).

As there was no proof offered of wrong doing by the government in the matter, of course there was no judicial review and revision of the Land Department's findings on the ground of irregularity. *Why, we ask, in view of the foregoing circumstances, should a man who is sued by an alleged pauper have paid for the printing in this court of about 160 pages of matter which, as is obvious, had not the slightest effect on the deliberations of the courts below?*

If all the testimony given from the witness chair in the District Court in No. 495 (R. 65 to 71 in No. 495) were accepted at its face value (there being absolutely nothing therein to show fraud practiced upon the Land Department or arbitrariness practiced by it), it would be impossible to say with respect to it that it warranted the judiciary in revising, modifying or changing the Land Department's findings of fact. *Is it supposable that any court would disregard or ignore, or impute error to, the Land Department's findings of fact in a case which involved the patenting of a tract of land to one of two rival*

claimants, upon only such wholly uncorroborated and duly objected to testimony, having pertinence exclusively under the issues of fact which were duly heard and determined in the Land Department as was given from the witness chair in the District Court in No. 495 by the man who was adversely affected by those findings, who had maliciously questioned the integrity of sundry Government officials, who had been convicted of criminal conspiracy and who, himself, together with others, without let or hindrance, testified in the proceeding in the Land Department that eventuated in the findings?

What then is apparent on the face of the decisions below as to what was held concerning the Land Department's findings of fact? *On the face of those decisions, in the express language thereof, it was held that the 5th section of the act of June 27, 1906, 34 Stat. 519, 520, relieved reclamation act homestead entries from contest on a charge of abandonment. From that holding it logically followed that it was a matter of no concern to the courts below whether the Land Department had or had not made findings of fact in a Bodkin-Edwards contest proceeding, and therefore, and because Edwards' bill of complaint had not so impeached the findings as to warrant a judicial inquiry as to them, there was no review of said findings by any court below and no implication in the decision by either that there was such review.*

When the Supreme Court of the United States affirms, it concurs in a conclusion reached and a judgment given by the lower court. The affirmance presupposes knowledge of the basis for the conclusion or judgment announced below. The affirmance approves and confirms such basis. If the basis be in fact exclusively, the court accepts the fact as found below. If the basis be in law

exclusively, the court sanctions and approves the rulings in law as made below.

AN APPELLATE COURT, BY AN AFFIRMANCE, CANNOT CHANGE THE CHARACTER OF THE CASE BELOW FROM ONE WHICH WAS DECIDED BELOW ON QUESTIONS OF LAW TO ONE WHICH WAS DECIDED BELOW ON QUESTIONS OF FACT. STATED WITH APPOSITENESS AS TO NO. 495, OUR PROPOSITION IS THIS: THAT IF THE DECISION OF DISTRICT JUDGE TRIPPET, 267 FED. 1004, AND THE DECISION OF THE COURT OF APPEALS, SPEAKING THROUGH DISTRICT JUDGE WOLVERTON, 265 FED. 621, IN THEIR EXPRESS AND UNMISTAKABLE TERMS, ARE CONCURRING DECISIONS UPON QUESTIONS OF LAW WHICH ARE DETERMINATIVE OF THE MERITS OF THE CASE OF EDWARDS V. BODKIN, IT UNAVOIDABLY FOLLOWS FROM THE AFFIRMANCE OF THOSE DECISIONS BY THIS COURT THAT IT HAS CONCURRED IN AND CONFIRMED THE RULINGS MADE IN THOSE DECISIONS ON QUESTIONS OF LAW, REGARDLESS OF THE STATEMENT IN THIS COURT'S AFFIRMANCE THAT THE DECISIONS BELOW WERE CONCURRING DECISIONS ON QUESTIONS OF FACT WHICH WERE DETERMINATIVE OF THE CASE OF EDWARDS V. BODKIN.

The social law of simple courtesy would require the judiciary, when revising, altering, changing or disregarding the findings of fact made by one of the more important branches of the executive department of our government, to state explicitly the considerations that moved it to conclude that such findings were without due, or any foundation, in the law. If Judge Trippet revised any of

the findings of fact made by the Land Department, he gave not the slightest hint that he had revised the following finding which was made by the First Assistant Secretary of the Interior, to wit:

> "He (Edwards) evidently did considerable work on the land, in cultivating, digging brush, et cet.; *but this work was after he had personal knowledge that the contest had been filed*" (R. 43).

It is not believable that any enlightened court, without stating fully and clearly its reasons for so doing, would have rejected as being without due or any evidence to support it the following findings of fact made by the General Land Office in the contest proceeding between Bodkin and Edwards, to wit:

> "Defendant had knowledge of the pending contest against his entry, prior to the time he returned to the claim, as plaintiff had mailed him a letter on March 26, 1908, informing him of the contest, and requesting him to sign and return a relinquishment inclosed with the letter. In answer to this letter, defendant went to the office of plaintiff and talked the matter over with him.
>
> "The testimony of the witnesses, including that of the defendant, conclusively established the truth of the charges made in the affidavit of contest.
>
> "The testimony shows beyond a question that, at the time the contest was begun, no improvements of any kind were then on the premises, that defendant had been absent for a long period, and that he had never cultivated any part of the land.
>
> * * * * * *
>
> "Defendant's excuse for being away from the land is that he could not make a living on the same, owing to lack of water for irrigation purposes. He offered testimony to this effect, though it is shown that

others in the same community managed to get along under similar conditions and circumstances.

"Defendant returned to his claim about the first of April, 1908, and after failing to get the contest dismissed, commenced the first active work of improving the land, other than that heretofore referred to.

* * * * * *

"Defendant admits that in 1907, prior to his return to the land, he registered and voted at the town of Imperial, and he would not say that he did not vote at other times prior thereto.

* * * * * *

"He admits that he saw the Government circular relative to these Government projects, and if he did, he must have been then and there advised that he must meet all the requirements of the homestead law, and that he could not depend upon water being brought to the land by the Government and use that as an excuse for failure to meet the requirements.

"In the instructions of the Department as to the arid lands, it was distinctly stated that no modification of the homestead law in its application to said lands could be made, as the Secretary of the Interior had no authority to extend the time for the establishment of residence, or to change any of the conditions of the homestead law as to the maintenance of such residence and cultivation of the land. See 32 L. D., 633" (R. 40 and 41).

In his second opinion (R. 78 to 83), the one on rehearing, Judge Trippet held, as he was perforce required to hold, that, in contemplation of law, Bodkin had never initiated a contest. That holding, as he was careful to make plain, was rested upon the Court of Appeals ruling in 249 Fed. 562. *The fact in proof which Judge Trippet, and afterwards the Court of Appeals, deemed sufficient to sustain such holding, to wit, the fact that Bodkin executed his affidavit of contest on information*

and belief, although it appeared to have been executed on actual knowledge and was corroborated on personal knowledge, is set out at pages 64 and 65 of the record in No. 495 in this court. THE SECOND OF THE ERRORS SPECIFIED IN THE ASSIGNMENT ON THE APPEAL TO THE SUPREME COURT OF THE UNITED STATES IN NO. 495 CHALLENGED THAT HOLDING.

That the said fact and the said ruling thereon were deemed by Judge Trippet to be of vital import, is deducible from this observation by him, viz, "If there was no contest, the defendant never acquired any preference right, and that fact has an important bearing throughout this case" (R. 80).

Immediately after making the foregoing observation, Judge Trippet said, that "the court of appeals points out (p. 569) that EVEN THOUGH THERE WAS A CONTEST, THE DEFENDANT BODKIN COULD NOT HAVE OBTAINED ANY PREFERENCE RIGHT" (R. 80).

The Court of Appeals did so point out, for it said in 249 Fed. 562, 569, that:

> "We are of opinion that whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909" (37 L. D., 365).

THE THIRD OF THE ERRORS SPECIFIED IN THE ASSIGNMENT ON THE APPEAL TO THE SUPREME COURT OF THE UNITED STATES IN NO. 495 CHALLENGED THAT HOLDING.

As it had been held by the Court of Appeals theretofore (249 Fed. 562), (1st) that there had been no contest, and (2d) that even if there had been one the regulations of 1909 terminated the preference right, was not

Judge Trippet compelled by "the law of the case" doctrine to remark, *in the light of the record as printed in this court,* that Bodkin "had no rights to be considered" (R. 80).

The only other matter of fact or of law noticed by Judge Trippet was the construction placed by the Court of Appeals on the 5th section of the act of June 27, 1906, in 249 Fed. 562, 567. In noticing it, Judge Trippet, who might or might not have actually agreed with it, availed of the occasion to say: "In any event the Court of Appeals has settled the law of this case, and this court must follow the decisions upon that subject" (R. 81). Then proceeding to show the extent to which that construction of a statute was controlling in the case, Judge Trippet said:

> "It must be borne in mind that the Court of Appeals in this case has decided, that the plaintiff did not have to make improvements upon the land. If the Land Office meant by stating that the plaintiff did not act in good faith, in that, he did not make improvements and reclaim the land as required by law, then the opinion of the Court of Appeals is to the effect that he did not have to comply with the homestead law in this regard during the times of withdrawal" (R. 82).

THE FIRST AND SECOND OF THE ERRORS SPECIFIED IN THE ASSIGNMENT IN NO. 495 IN THIS COURT BROUGHT THAT CONSRUCTION OF A STATUTE OF CONGRESS UNDER REVIEW HERE.

The Court of Appeals opinion, delivered by District Judge Wolverton (R. 84 to 86), on the appeal from Judge Trippet's rulings, contains this all too true observation:

> "There is much testimony in the record that is concededly irrelevant and immaterial, much that is incompetent as well, but its admission by the trial court over objections and exceptions affords no ground in a cause in equity for reversal. The Court of Appeals gives consideration only to such as is competent and material to the issues joined" (R. 86).

Nowhere in Judge Wolverton's opinion is there the shadowiest of intimations that Judge Trippet had revised, modified or changed any findings made by the Land Department. Nor is there therein anything to indicate that Judge Wolverton gave any heed to the evidence in the contest proceeding in the Land Department, which was thrust into the record on the initiative of the alleged pauper, Edwards. *Said opinion by Judge Wolverton is, by logical and necessary inference, an unmistakable announcement that the case came before the Court of Appeals the second time upon a record containing enough of fact, even in the absence of copies of the patents that issued to Bodkin, and even in the absence of the evidence taken in the contest proceeding in the land department, to sustain every one of the previous rulings of the Court of Appeals in matters of law.*

One comment made by Judge Wolverton is deserving of special notice. He says (R. 85) that the Court of Appeals first decision held that the Land Department erred in cancelling Edwards' entry for abandonment "while in fact he was residing upon the land and holding it." *Under no possibly rational view of the case can that comment be accepted as indicating that Judge Wolverton had examined the evidence adduced in the contest proceeding in the Land Department, and had held that it was without any proof whatever to sustain the said depart-*

ment's findings and conclusions that "there has been an utter lack of good faith shown in his (Edwards') relations towards his entry" (R. 38), *"that defendant (Edwards) has never established a bona fide residence on the land covered by his entry" * * * "and defendant (Edwards) admits that his home and residence has at all times been at that point (in the town of Imperial, California), that he has been engaged in business there, from a date soon after making his entry up to the time that he had knowledge of the pending contest against his entry, and then came to the land"* (R. 41), *that "Indeed, his actual home was in another county, where he was qualified as a voter by swearing that he resided there. He states that he visited the land about every six months, staying only a few days at a time. He had no house to live in. In fact he had no house completed at date of hearing, more than six years after entry."* (R. 42 and 43).

THERE WAS INDEED CONCURRENCE BELOW, BUT IT WAS A CONCURRENCE THAT SAID DEPARTMENT'S FINDINGS COULD BE, AND WERE, DULY ACCEPTED AS FINDINGS MADE IN A CONTEST PROCEEDING, BUT IN A CONTEST PROCEEDING WHICH, AS THE COURTS BELOW HELD, WAS INVALID BECAUSE FORBIDDEN BY LAW.

THE CONCURRENCE BELOW WAS UPON THE SIGNIFICANCE AND EFFECT IN LAW OF THE DOCUMENTARY EVIDENCE, WHICH WAS PRESENTED UNDER AN AGREED STATEMENT OF FACTS (R. 20 *et seq.*), AND THE TESTIMONY OF EDWARDS AND McFEE FROM THE WITNESS STAND, WHICH BODKIN, WISELY, MADE NO ATTEMPT TO CONTRADICT. OF COURSE

THIS COURT IS WITHOUT MIRACULOUS POWERS. HENCE THE EXACT CHARACTER OF THE CONCURRENCE BELOW CANNOT BE ALTERED MERELY BECAUSE THIS COURT, MISTAKING THE CHARACTER OF THE CASE BELOW, BASED ITS AFFIRMANCE UPON THE MISCONCEPTION THAT "THE CASE AS PRESENTED HERE TURNS ESSENTIALLY ON QUESTIONS OF FACT."

As did Judge Trippet, in the District Court, Judge Wolverton in the Court of Appeals appears to have taken some pains to render it clear that it could not be fairly inferred that his individual views on the pertinent matters of law were necessarily the same as those expressed by the Court of Appeals, speaking through Circuit Judge Morrow, in 249 Fed. 562. For instance, Judge Wolverton said:

> "It is unnecessary to restate the reasoning of the court which induced the result." * * * "Those reasons are fully stated in the opinion of the court." * * * "It is a rule of law no longer to be controverted in the Federal Courts, THAT WHATEVER HAS BEEN DECIDED UPON ONE APPEAL CANNOT BE RE-EXAMINED IN A SUBSEQUENT APPEAL OF THE SAME SUIT OR ACTION" (R. 85, 265 Fed. 621. Upper case supplied).

No question of fact having been decided on the first appeal to the Court of Appeals, and there having been thereafter a virtual submission of the case in the District Court on documentary evidence and testimony which Bodkin never controverted, but only contended was not sufficient in law to warrant the relief prayed for by Ed-

wards, why is it not perfectly plain that what Bodkin was seeking to have the Court of Appeals do on the second appeal, WAS NOT TO REVIEW MATTERS OF FACT BUT TO REVIEW AND REFUSE TO FOLLOW FORMER RULINGS IN MATTERS OF LAW.

BODKIN'S THEN COUNSEL MUST HAVE REALIZED, WHEN THEIR CLIENT WAS IN THE DISTRICT COURT FOR THE SECOND TIME, AND AFTER EDWARDS' AMENDED ANSWER WAS FILED, THAT THEY WERE ASSUREDLY ON THE FIRST LEG OF A JOURNEY TO THE SUPREME COURT OF THE UNITED STATES FOR RELIEF FROM RULINGS IN MATTERS OF LAW, WHICH RULINGS CAUSED JUDGE TRIPPET TO REMARK, THAT "WE WILL, THEREFORE, PROCEED TO CONSIDER THE CASE WITHOUT REGARD TO THE RIGHTS OF BODKIN, FOR UNDER THE DECISION OF THE COURT OF APPEALS, HE HAD NO RIGHTS TO BE CONSIDERED."

May we not, in view of the foregoing demonstration of the soundness of our contention, very respectfully but earnestly insist that No. 495 never was in this court, nor in any court, a case of a character that "turns essentially on questions of fact," but that it was at all times a case that presented nothing beyond or different from questions of pure law, and, therefore, that it was in this court, substantially as Nos. 291 and 292 are here, upon proceedings practically the same in effect as the submission of a case on demurrer to the evidence?

IV.

GRIEVOUSLY WRONGED WOULD BE THE RESPONDENTS IN NOS. 291 AND 292 IF THIS COURT'S DECISION OF FEBRUARY 28, 1921, IN NO. 495 SHOULD BE HELD TO BE DETERMINATIVE OF THE ISSUES IN THEIR CASES.

If it be perfectly obvious from the language of a Federal, or any, court's decision, or if it be a truth apparent upon actual study of the language of such decision in the light of the record in the case, that the decision determined absolutely nothing in the case but questions of law, is it within the range of judicial possibility that this court (misconceiving what occurred in the court below), by mere assertion that the decision, determination and adjudication below turned upon questions of fact, can require the bench and bar to disregard the real character of the basis for the decision below and treat it as a decision which was rested upon an entirely different basis than that which the court below had assigned for it? This question is not asked in a spirit of disrespect. It is propounded in aid of elucidation of our contention that this court very evidently misconceived the true character of No. 495 when it referred to it as a case which "as presented here turns essentially on questions of fact."

In No. 495 Edwards did not rely upon a settlement existent upon April 18, 1910, nor upon an application to enter which was filed May 18, 1910. *But the two petitioners in Nos. 291 and 292 do rely exclusively upon settlements made on April 18, 1910, and upon applications filed on May 18, 1910.*

Neither of the petitioners in Nos. 291 and 292 is

claiming, as Edwards claimed in No. 495, under a homestead entry which he alleges was unlawfully canceled on contest proceedings. The men who claimed under the canceled homestead entries referred to in Nos. 291 and 292, never asserted a claim after the cancellations were ordered and entered. *But as their entries were in fact cancelled under circumstances similar to those under which the Edwards entry was canceled, then their entries are still intact and existent on the records of the land department, in contemplation of law, if, as was said in 249 Fed. 502, the 5th section of the act of June 27, 1906 (34 Stat. 519, 520), forbade contests on the ground of abandonment and left the Land Department without jurisdiction to entertain contests upon that ground and, consequently, powerless to order and effect a valid cancellation.*

Opposing counsel will probably find it somewhat embarrassing to contend in Nos. 291 and 292 that the decision of this court of February 28, 1921, in No. 495 rules the decisions in Nos. 291 and 292. The embarrassment they cannot escape is this:

That if this court's said decision of February 28, 1921, is an actual concurrence in the views of the Court of Appeals in No. 495 as to the meaning of the act of 1906, *supra*, then, necessarily, the homestead entries which Fleischer and Ocheltree, the respondents in Nos. 291 and 292, respectively, contested and had canceled, were never contested and were never canceled, in contemplation of law and therefore, also in contemplation of law, were intact on the records of the Land Department on April 18 and May 18, 1910, and have been ever since, from which would follow a situation which opposing counsel will doubtless discuss more fully in their argument at the bar than they have in the briefs they filed on April 16, 1921.

It was in nowise essential to relief for Edwards under his bill of complaint, for the Court of Appeals to have passed upon the validity of the Interior Department's regulations of June 6, 1905, 33 L. D., 607, and of January 19, 1909, 37 L. D., 365. Edwards was afforded full relief under that court's views that the said act of 1906 relieved homstead entries from contest and that, because Edwards continued in occupancy of the land until after it was restored to settlement and entry on April 18, 1910, and May 18, 1910, respectively, it was unlawful for the Land Department to have allowed Bodkin to make entry. *Remembering that proposition, there will be agreement with us that this court's affirmance of February 28, 1921, in No. 495, may well be said to have affirmed only those rulings in law below which were essential to determination of that case below in favor of Edwards, and leaves still open for decision by this court the question whether it should approve and confirm the views of the Supreme Court of the State of California in Nos. 291 and 292 as to the effect in law of the said regulations of 1905 and 1909, respectively, or ratify and sustain the opposite views of the Circuit Court of Appeals (249 Fed. 562) as to the effect in law of the same regulations.*

V.

IN THE PETITION FOR REHEARING IN NO. 495, AS WELL AS HEREIN, WE SHOW PLAINLY THAT THE AFFIRMANCE IN NO. 495 WAS DUE ENTIRELY TO NOTHING ELSE BUT THE EASILY PROVEN, IF NOT NOW OBVIOUS, MISCONCEPTION THAT SAID CASE HAD BEEN PRESENTED HERE ON QUESTIONS OF FACTS.

At the outset of this chapter of our brief, we refer to the allusion in this court's opinion of February 28, 1921, to the fact that "under the appellant's specification of what should be included" in the record of No. 495 in this court, a part of the evidence in the courts below was omitted.

If it be true that this court has repeatedly decided, that the decisions of the Land Department are conclusive everywhere as regards all questions of fact.

If it be true that it is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of said department upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country.

If it be true that the findings of fact of officers of the Land Department cannot be reversed or corrected by the courts in a collateral proceeding between private parties.

If it be true that in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final,

If the foregoing elementary and familiar principles of jurisprudence were undoubtedly in the minds of the courts below when they were considering the case which was No. 495 in this court,

May we not state it as an absolute fact, and for verification of such statement confidently refer to the language of the decisions below and to all the logical implications thereof, that none of the courts below revised, modified or changed a single finding of fact made by the Land Department in the Bodkin-Edwards contest?

May we not also state it as an absolute fact, and base such statement upon the same language and same implications of the same decisions, that *no court below made*

any finding of fact which is without its evidence in the record of No. 495 in this court?

May we not also state it as an absolute fact, and rest such statement upon said decisions and upon the contents of said record, that *there is set out in the record of No. 495 in this court all the evidence of every fact upon which every ruling below in a matter of law was based?*

If we are entitled to answers in the affirmative from this court to the foregoing questions, then, as we submit, *the record in No. 495 in this court was complete for all the purposes of an adjudication by this court under all the errors alleged in the assignment in No. 495.*

This court's opinions are reported and widely read. The reports thereof carry the names of counsel. Whatever lack of intelligence or diligence on the part of Bodkin's counsel in No. 495 was indicated by his withholding of answer to a motion to dismiss or affirm which motion, on its face, was utterly meritless, there can be no just inference that he painstakingly omitted from the record in No. 495 in this court matter which he deemed hurtful to his client's case and helpful to the case of his adversary.

Owing to the manner of the summarization in this court's opinion of February 28, 1921, of what it deemed to be the record shown facts in No. 495, it might be inferred that "Bodkin instituted a contest against the entry" *after, instead of long before,* Edwards submitted final proof. It is also remarked in such summarization that Edwards "submitted final proofs in due course."

The record shown facts are that the "final proofs" were submitted on April 23, 1909, *six years and four months after the making of the entry, about a year after there was service on Edwards of Bodkin's contest, about four months after the Register and Receiver rendered their decision that Edwards' entry should be cancelled*

on Bodkin's contest, and when the contest proceeding was on appeal to the General Land Office (R. 44 and 37 to 39).

It is remarked in the said opinion of this court that "the land officers then permitted Bodkin to make a homestead entry of the land, afterwards allowed him to relinquish that entry and make others of the same tract under soldier's additional rights of which he was the assignee," et cet. *When the court made the above remark it should have occurred to it, and we do not say that it did not, that when the Land Department had "permitted" and "allowed" as above stated, it was, presumptively, administering the law as it in good faith understood it and honestly believed it should be applied as between Bodkin and Edwards. It must be taken for granted that this court perceived that the litigation revolved about the question whether what was thus "permitted" and "allowed" was lawfully "permitted" and "allowed." But this court did not expressly pass upon the lawfulness of what was "permitted" and "allowed,"* ALTHOUGH THE ASSIGNMENT OF ERRORS ON THE APPEAL SOUGHT TO HAVE IT DO SO AND SOUGHT NOTHING MORE THAN AN EXPRESSION FROM IT ON MATTERS OF LAW EXCLUSIVELY.

The record in No. 495 shows that Bodkin's application to make homestead entry in the exercise of his preference right was filed May 18, 1910; that it was suspended for a reason not material here and that it was "permitted," or approved and an entry made thereunder, on June 1, 1912 (R. 55); that nearly two years thereafter, on March 6, 1914, Bodkin relinquished the entry *without abandoning the land*, for on the same date he filed or located the soldiers' additional rights (R. 59 et seq); that on December 23, 1914, and for the reasons set out in its decision of that date, the General Land Office "allowed," or au-

thorized final entry under, the soldiers' additional rights (R. 59 to 64); that, as set out in said decision and more fully shown in Wells v. Bodkin, 47 L. D., 288, what the General Land Office thus "allowed" was, in fact, something Bodkin felt he was required to do, and which he had the unquestionable right to do (as the Land Department duly adjudged he had), if he desired to exercise and enjoy the rights he and his wife became entitled to as the heirs of his unmarried daughter, Florence Bodkin, who died after acquiring a right under the homestead laws which passed to and vested in her heirs. *These facts,* NOT QUESTIONED BY EDWARDS OR ANYONE, *all appear in the record in No. 495. The views of the lower courts thereon as to their effect in law controlled the decisions of those courts.* THOSE VIEWS ARE DULY CHALLENGED IN THE ASSIGNMENT OF ERRORS IN NO. 495. SURELY THIS COURT, IF IT HAD NOT MISCONCEIVED THE TRUE CHARACTER OF NO. 495, WOULD NOT HAVE, COULD NOT HAVE, SAID THAT "THE CASE AS PRESENTED HERE TURNS ESSENTIALLY ON QUESTIONS OF FACT."

The so-called scrip selection by Bodkin seems to us to have unduly affected the minds of the courts below, possibly excited therein an unconscious leaning toward Edwards in the litigation. *But what if Bodkin had used the so-called scrip at the outset, and not until after he had resided upon the land for about two years under his homestead entry?* In other words, what would have been the effect in law of use of the so-called scrip on May 18, 1910, when Bodkin filed his homestead application to enter in exercise of his preference right as a successful contestant? Bodkin rested under no legal obligation to exercise that preference right by tendering a homestead

application. On May 18, 1910, the land was restored to entry under the general land laws, and therefore Bodkin could then have used the scrip, if he had so desired, *regardless of Edwards occupancy of the land at that time. If that proposition is not sound then there are other decisions and regulations of the Land Department that are obnoxious to law and the public interests, notably the decision of November 10, 1919, in Goodwin v. Goodin, 47 L. D., 298, wherein it was said:*

> "In the opinion of this Department none of the charges made in the protest justifies the rejection of Goodin's application to enter. Neither the settlement of Goodwin, which was made after the cancellation of the entry contested by Goodin, *nor her occupation of the land at the date of his application to enter,* defeated his preference right. (Hodges et al. v. Colcord, 24 L. D., 221; Thorbjornson v. Hindman, 38 L. D., 335; Arnold v. Burger, 45 L. D., 453.)
>
> "It is not contended that the soldiers' additional right here involved was not valid, or that it was not formally assigned to him, or that it would for any reason not support his entry, and the mere fact that he is not seeking the land for his own continued use and benefit does not forbid the allowance of his application and will not invalidate his entry. *He was not required to show that he was not seeking to make this entry for speculative purposes, as is the case with an applicant under the general provisions of the homestead laws. He gained a personal right and benefit by securing the cancellation of the former entry and it can not be said that he is guilty of fraud if he elects to utilize that right and benefit by entering the land and immediately transferring it to some other person."*
>
> * * * * * *
>
> "In this case the title to the soldiers' right is held by Goodin himself. The entry will be his entry

and in his name, and the patent will issue to and vest the title to the lands applied for in him." (Italics supplied.)

Another observation in this court's said opinion should be discussed here. It is that "Bodkin answered and the issues were tried." Did this court misconceive the mode of trial? Bodkin's answer is set out at pages 11 to 29 of the record. Its denials cast upon Edwards' proof of every allegation of fact in his bill of complaint which the Court of Appeals in 249 Fed. 562 had rendered material by its rulings on several matters of law. The proof Edwards offered was contained *in the agreed statement of facts* (R. page 30 to paragraph 28 on page 64), in the entire evidence taken in the contest proceeding in the Land Department, which was omitted from the record in this court (with the implied if not express, consent of Edwards and for the valid reasons set out in detail elsewhere herein), a portion of Bodkin's testimony in the contest proceeding (R. 64, 65), and the testimony by Edwards and one McFee which was taken in the District Court (R. 65 to 71). NO ATTEMPT WHATSOEVER WAS MADE BY BODKIN TO REBUT SUCH PROOF IN ANY RESPECT OR TO ANY EXTENT. Bodkin put into the record copies of the patents that issued to him and copies of pleadings and of notes of proceedings in possessory actions in the State Court which, for valid reasons stated elsewhere herein, were not carried into the record for this court.

We respectfully submit that from the foregoing it is manifest that no issues of fact were actually tried below; that there was no controversy below between the parties as to facts; *that, after the coming in of Edwards' colorable amended bill, Bodkin realized that Edwards would attempt to make no proof (and he did not) of any fact*

other than what might be essential as a basis for his becoming the beneficiary of those rulings in matters of law which the Court of Appeals made in 249 Fed. 562, and which Bodkin believed to be utterly unsound. IN SUCH CIRCUMSTANCES, WITH BODKIN CONTROVERTING NOTHING HIS ADVERSARY CHOSE TO PUT IN THE RECORD, BUT PLAINLY AND OF NECESSITY RELYING UPON THIS COURT TO REVIEW THE RULINGS IN 249 *Fed.* 562, WE VERY RESPECTFULLY SUBMIT THAT NO. 495 WAS IN THIS COURT ON QUESTIONS OF LAW EXCLUSIVELY.

Lest we fail of performance of our full duty to the court and to our clients, we ask the court's indulgence to comment on the following statement in its opinion of February 28, 1921, in No. 495, to wit:

> "The court found that the material allegations of the bill were true; that in proceedings before the Land Department matters presented by Edwards which should have been considered were not considered, and that in consequence the title was passed to Bodkin when it should have gone to Edwards."

Of course this court did not mean that the court below had found that Edwards had presented to the Land Department the matter of the alleged immunity of homestead entries from contest for abandonment, because of the 5th section of the act of June 27, 1906, 34 Stat. 519, 520, and that the department had neglected or refused to consider it. *But as a matter of fact the said statute is the only thing any court below found had not been considered by the Land Department.* No court below found that said department had not done what the record in this court in No. 495 plainly shows that it did, to wit, consider Ed-

wards' defense against Bodkin's contest, consider Edwards' application for second homestead entry, consider Edwards' application to contest Bodkin's entry, consider Edwards' motion for acceptance of his final proof, and consider the merits of Edwards' protest against the so-called scrip selection. (R. 37 to 43; 50, 53, 57, 58, 59, 71 and 73). No other matters than these were ever presented by Edwards to the Land Department for its consideration *and Edwards did not allege in his complaint that he had submitted other matters to the Land Department and that they were not considered by said department. What the courts below did clearly hold was that the Land Department had, after consideration, rejected Edwards' final proof when, if said department had not "misunderstood" or "overlooked" the said act of 1906, it would have accepted and approved it.*

This court was not at all specific or explicit as to what it had apprehended, upon review by it of the record in No. 495, were the matters of fact or of law which the courts below found "should have been considered," but "were not considered" by the Land Department. However, it must be assumed that this court, although not stating or describing those matters of fact or of law in its opinion of February 28, 1921, perceived their real existence and affirmed the decree below solely because such matters had not been considered by the Land Department. We beg leave to remark that we deem it very unfortunate that the language of this court's decision of February 28, 1921, leaves for conjecture what those matters were. *We do not know what they are. Surely they are not pointed out in this court's decision nor in any decision below. Therefore, we are left in the dark by the judiciary as to the precise default on the part of the Land Department which only the Supreme Court of the*

United States has made the basis for a decree of virtual transfer to Edwards of the property of Bodkin.

In concluding this chapter of our brief we very respectfully submit that No. 495 was not a case in this court in which there was express or implied agreement between the litigants as to the materiality of the allegations of the bill of complaint, a voluntary recognition by the plaintiff, under an answer to the bill and by denial of its averments, that a cause of action was stated, and that the granting of the relief prayed was dependent solely upon proof establishing the allegations of the bill. *Bodkin's answer to Edwards' complaint was enforced by the Court of Appeals' rulings in matters of law, 249 Fed. 562. From those rulings, and from them alone, the allegations of Edwards' bill became endowed with the merit of materiality. Bodkin not having raised any question below or here that called for any ruling other than one as to whether all the uncontroverted documentary evidence, and the testimony from witnesses, established facts which, in law, were sufficient to warrant the granting of the prayers of Edwards' bill, we submit that No. 495 was not of the class of cases which, although presenting Federal questions, will not, under the settled rule of this court which is referred to in its said opinion of February 28, 1921, be reviewed here on alleged errors having to do solely with the admissibility of evidence to establish facts.* IN SHORT, NO. 495 WAS NOT HERE FOR DECISION AS TO WHETHER FACTS WERE DULY IN PROOF, BUT WAS HERE FOR DECISION AS TO WHETHER SUCH FACTS AS THE COURTS BELOW STATED THEY FOUND, WERE SUFFICIENT IN LAW TO SUSTAIN THEIR RULINGS.

VI.

McLAREN AND CULPEPPER COULD HAVE LEARNED AT THE LAND OFFICE IN LOS ANGELES, BEFORE THEY MADE THEIR SETTLEMENTS, OF THE AWARDS OF PREFERENCE RIGHTS OF ENTRY TO FLEISCHER AND OCHELTREE.

That the land in suit was *surveyed* at all times mentioned in the bill of complaint, is a permissible deduction, if not an admitted fact, in this litigation. Another fact that may be deemed to be satisfactorily in proof is that Fleischer knew the description, in terms of the official surveys, of the lands in suit, on April 18, 1920, when he made settlement thereon. Obvious it is that he knew such description on May 18, 1910, when he filed his application for entry.

Persons who connect themselves with the surveyed public lands with view to asserting claims thereto, are chargeable with notice of what the official records in the appropriate local Land Office show, both as to the status of the lands and existing claims or rights with respect thereto. *McLaren could not have known on April 18, 1910, that the land in suit was surveyed* PUBLIC LAND, *unless he knew what the records in the appropriate local Land Office showed with respect to it.* Therefore, if McLaren did not know on April 18, 1910, that the land he settled upon on that date was subject to the preference right of entry which had been earned by and was *vested* in Fleischer, his ignorance in that regard cannot be helpful to him here, for, as is patent, Roe's ignorance of Doe's rights does not either destroy or diminish those rights or make them subject to, subordinate to and

inferior to an act done by Roe in ignorance of a fact of which he has knowledge because charged with knowledge by law.

The foregoing observations have been made only because of the possibility that this court might be asked, in the argument of opposing counsel, to decide against Fleischer and Ocheltree and for McLaren and Culpepper, owing to the fact that the order of restoration of the lands to the public domain did not state that some of the lands might be entered in the exercise of contestants' preference rights of entry. *While there is nothing in the pleadings to the effect that McLaren and Culpepper were misled by the notice of the order of restoration into the belief that the lands were free from all claims, and that the first settlers would acquire the first rights, and that, therefore, they made their settlements without notice of the said preference rights, it is not entirely impertinent to remark here that whether the order of restoration did or did not notify the public of the existence of such preference rights, no omission of any duty by any officer of the Land Department could have deprived Fleischer or Ocheltree of those rights.*

VII.

THE ULTIMATE AND ONLY REAL QUESTION IN NOS. 291 AND 292 WAS THE SAME ULTIMATE AND ONLY REAL QUESTION IN NO. 495, TO WIT, DID A SETTLEMENT UPON THE LAND WHICH WAS EXISTENT ON APRIL 18, 1910, DEFEAT THE PRE-EXISTENT PREFERENCE RIGHT WHICH WAS IMPOSSIBLE OF EXERCISE UNTIL MAY 18, 1910.

Now having done with the rulings of the Court of Appeals, speaking through Circuit Judge Morrow, 249 Fed. 562, so far as they were *controlling* below in No. 495, we will deal with those other rulings in that decision which it was wholly unnecessary for that court to make in view of its conclusion that Edwards entry never had been lawfully contested and never had been lawfully cancelled.

Is it true, as said court declared it was, that the department's regulations of June 6, 1905 (33 L. D., 607), were invalid because, in effect, and attempt by the Land Department to legislate, to amend the act of May 14, 1880, 21 Stat. 141? The question is a very serious one, for if the said court's views are sound many titles under many patents issued by the Land Department are in jeopardy.

When the Land Department withdraws lands it does so, presumably, in promotion of the public interests and in the exercise of a power Congress has granted it. *An order of withdrawal is the government's method of asserting a government claim to public land for the general good. It usually takes the form of a reservation of public lands from disposal pending legislation, or the determination of some question as to the character of the land or as to its value for governmental uses.*

The lands in suit were withdrawn under the Reclamation Act of June 17, 1902, 22 Stat. 388. The petitioner's bill of complaint does not aver the existence of any withdrawal prior to the "first form" withdrawal which, as alleged in the complaint, was made on September 8, 1903. A first form withdrawal—

> "embraces lands that may possibly be needed in the construction and maintenance of irrigation works

> and the other commonly known as 'withdrawals under the second form,' which embraces lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works." Instructions of June 6, 1905, 33 L. D., 607.

Thus it appears, that when a first form withdrawal is made, the government has concluded that it might find the lands described therein essential to *the construction* of a governmentally originated and conducted enterprise for the irrigation of public lands. *Therefore the lands described in such a withdrawal are lands which, presumably, the government desires to retain permanently in the ownership of the United States, in order that the government may use them, occupy them, and build and construct thereon works for the irrigation of other and nearby or contiguous lands. In short, such a withdrawal is made to prevent the initiation of claims to the land that might ripen into titles thereto, with resultant necessity on the part of the United States to re-acquire title through purchase or condemnation proceedings.*

Is it not a logical corollary of the foregoing that the government should desire, that the public interests should require, the extinguishment of any mala fide claims, which had been initiated before the withdrawal, or claims which were not being maintained in accordance with law?

> "Withdrawals made under either of these forms do not defeat or adversely affect any valid entry, location, or selection which seregated and withheld the lands embraced therein from other forms of appropriation at the time of such withdrawal; and all entries, selections, or locations of that character should be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which

they would have proceeded had such withdrawal not been made, except as to lands needed for construction purposes."

* * * * * *

"Any entry embracing lands included within any withdrawal, made upon either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the Land Office fees occasioned by his contest will be awarded a preferred right of making entry under the reclamation act, provided the lands involved are not embraced within a withdrawal of the first form.

* * * * * *

"*When any entry for lands embraced within a withdrawal under the first form is canceled by reason of contest, or for any other reason, such lands become subject immediately to such withdrawal and can not, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.* (Italics supplied.)

"In the event any lands embraced in any entry under which final proof has not been offered, or in any unapproved or uncertified selection, are needed in the construction and maintenance of any irrigation work (other than for right of way for ditches or canals reserved under act of August 30, 1890) under the reclamation act, the Government may cancel such entry or selection and appropriate the lands embraced therein to such use, after paying the value of the improvements thereon and the enhanced value of such lands caused by such improvements." Instructions of June 6, 1905, 33 L. D., 607, 608, and 609.

The government employs men, known as special agents, to assist in ridding the public lands of spurious claims thereto. But if the government depended exclusively upon them for that purpose, much more land would be obtained fraudulently than is obtained. We do not mean that the special agents are not efficient and faithful public servants, we mean only that there are not enough of them for a really protective patrol of the public domain. Congress has aided the government otherwise than by appropriations for such employes, in freeing lands from mala fide claims. It has provided an inducement and a reward to citizens for bringing to the notice of the government the existence of mala fide land claims.

The right of an individual to contest a homestead entry for failure on the part of the claimant thereunder to maintain it in accordance with law is found in the homestead statutes. (See section 2297, Revised Statutes.) However, it was not until enactment of the statute of May 14, 1880 (21 Stat. 140), that a reward for contesting the entry of a defaulting claimant was offered by the United States. Such reward is described in said Act of 1880, as follows:

> "That in all cases where any person has contested, paid the Land Office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the Land Office * * * of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands." (21 Stat. 140.)

As to the policy of the law of contest the following is quoted from Brown v. Brown and Moses v. Brown, (2 L. D., 259, 260):

> "You will also please notify the local officers that Congress has in various ways invited and encouraged persons to inform against those who are endeavoring to acquire title to the public land fraudulently or illegally, as the only adequate means of protecting the United States; and that it is their duty to further this policy by examining carefully any application to contest a claim, pointing out its defects to the applicant, and allowing him to amend it at once."

The preference right of entry referred to in the said act was defined in Strader v. Goodhue, 31 L. D., 137, 138.

The petitioners here challenge the lawfulness of administration under said act of 1880 with view to ridding lands within first form withdrawals of mala fide claims thereto. They will contend, necessarily, that the functions of the Secretary of the Interior, as "the supervising agent of the government to do justice to all claimants *and preserve the rights of the people* of the United States" (Knight v. U. S. Land Association, 142 U. S. 161, 178. Italics supplied), do not require or permit him to promulgate a regulation of promise to a successful contestant, that, if the United States decides it does not want the tract of public land which was embraced in the entry the contestant had canceled, such contestant will be notified accordingly and will be allowed to make entry of such land at any time within thirty days after it has been restored to the public domain.

Said regulation is valid or invalid accordingly as this court views the range of the lawful discretion of the Secretary of the Interior in administering under said act of 1880, which is manifestly legislation in promotion of the public interests, in that its object is aid to the government in safeguarding the public domain against mala fide en-

tries and fraudulent appropriations? That being its object, should it not be both administered and construed liberally in effectuation of its salutary purpose? Administration under it has ever been exclusively within the province of the Land Department which has administered thereunder liberally. Is it essential to the public interests, or demanded by any law, that its provisions be so construed by the judiciary as to prevent its employment by the Land Department in exterminating a pest, viz., the speculative homesteader, from lands covered by first form reclamation withdrawals?

It is a logical inference that a contestant would not institute his contest and defray the heavy expense incident to its prosecution (the act of May 14, 1880, supra, and the decisions and rules of the Land Department thereunder requiring contestants to meet all the expenses of the contests), unless induced to do so by the offer of that uncertain reward which was held out by the regulations of June 6, 1905, to wit, a preference of entry only in event the withdrawal was revoked. Certainly contestants accepted that offer in good faith. They relied, they thought, upon the United States, speaking through the Secretary of the Interior, to grant, and not withhold, that uncertain and contingent reward, if earned. In view of these circumstances was there not something of a contractual relation between the contestants and the United States after the former began their contests? *If that contractual relation was not forbade by law, it is certain that this court should not render a decision with respect to it which would cause the United States to assume the role of a repudiator.*

This contractual aspect of the preference right was referred to in Wells v. Bodkin, 42 L. D., 340, in these words:

"His contest carries with it, therefore, an incipient and inchoate statutory right of entry and is in legal effect subsisting as between him and the United States, as the basis for such right of entry, until said right is exercised, waived or lost by some act of his, or is foreclosed by some interest of the Government or by limitation of the law. Neither the contestee nor any other person can, *by settlement or otherwise*, acquire any interest in the lands after initiation of the contest and prior to termination of the contestant's right of entry based by the statute thereon which is superior to such right in the contestant. Thorbjornson v. Hindman (38 L. D., 335)."

We shall say more concerning the said regulations of 1905, in connection with the ruling by the Court of Appeals, speaking through Circuit Judge Morrow, 249 Fed. 562, 569, "that whatever preferential right defendant had secured by his contest was terminated by the regulations of January 19, 1909," 37 L. D., 365.

In No. 291, as in No. 292, it is alleged that the first form withdrawal was made September 8, 1903. That was AFTER the original homesteader, Rider, in No. 291, and the original homesteader, Arnold, in No. 292, had made their respective entries. The contest against Rider was *initiated* on February 18, 1908. The contest against Arnold was *initiated* on January 30, 1908. The Rider entry was canceled, as a result of the contest, on January 28, 1909. The Arnold entry was canceled, as a result of the contest, on September 30, 1908. *All these dates are prior to January 19, 1909, except the date of cancellation of Rider's entry, which was nine days thereafter, or January 28, 1909. We call attention to these facts because, if the views of the Court of Appeals in 249 Fed. 562 are sound, Fleischer must lose in this court because*

the entry he contested was not canceled until after the regulations of January 19, 1919.

But obviously those views are as unsound so far as Nos. 291 and 292 are concerned, as they are so far as No. 495 are concerned, FOR IN ALL THREE CASES THE CONTESTS WERE NOT ALLOWED PRIOR TO THE WITHDRAWAL BUT THEREAFTER, AND THE REGULATIONS OF 1909 EXPRESSLY APPLY ONLY "WHERE A CONTEST HAS BEEN ALLOWED PRIOR TO SUCH WITHDRAWAL." See said 1909 regulations at page 365 of 37 L. D. THEREFORE SAID REGULATIONS HAVE NO APPLICATION IN NOS. 291 and 292.

While the 1909 regulations forbade the allowance *thereafter* of contests against entries of lands in first form withdrawals, its provisions as to the abatement of then pending contests were expressly limited to contests "allowed prior to such withdrawal." Why such regulations? Just a little thought will disclose the point of view of the officers who drafted those regulations, only to have them recalled after more scientific consideration. *A "first form" withdrawal is an adverse claim by the United States. The originators of the 1909 regulations thought more of that adverse claim by the United States than they did of the morality of just treatment of citizens whose contests, under the regulations of 1905, had been initiated and were in progress before the making of the first form withdrawal. They rather unwisely, if not arbitrarily, decreed that they would not permit a citizen who was perfectly willing to do so, to cancel a mala fide entry, with the reward for so doing dependent entirely upon the willingness of the government to abandon its adverse claim under the first form withdrawal, upon perceiving that the lands would not be needed for construction purposes and, therefore, might very properly be restored to*

the public domain for entry under the public land laws generally.

While not truly pertinent here, but certainly clearly indicative of the Land Department's realization that the regulations of 1909 were unwise, to the extent that they forbade future contests, the Instructions of August 24, 1912, 41 L. D., 171, and the Instructions of September 4, 1912, 41 L. D., 241, are cited for reference by the court. *Those instructions are now, and at all times since they were issued have been, in force and effect.*

For possible reference by the court for information as to the views of the Land Department on the basis of its claimed right to provide for contests against entries of land in a first form, or any form, withdrawal under the reclamation act, and to award preference rights to successful contestants, as well as to effectuate and safeguard those rights, see Beach v. Hanson, 40 L. D., 607; Edwards v. Bodkin, 42 L. D., 172; John T. Slaton, 43 L. D., 212; and Wells v. Fisher, 47 L. D., 288.

There is another contention the respondents will make which we should notice, viz, that the thirty day period for exercise of the preference right begins from date of cancellation of the entry, and that the preference right is forever lost, if the land continues in a first form withdrawal for more than thirty days thereafter. On that matter the Land Department, in John T. Slaton, supra, expressed these views:

> "The act of May 14, 1880 (21 Stat., 140), under which he gained such preference right, contemplates that notice of said right shall issue at a time when the land is subject to entry since time begins to run against the contestant from the date of such notice. Bassett v. Sunderlin (41 L. D., 437); Edwards v. Bodkin (42 L. D., 172)."

Have the foregoing views a basis in wise and lawful administration? The act of May 14, 1880, supra, does not command that the notice of the earned preference right shall be given forthwith upon cancellation of the entry. It says nothing as to the time of the giving of the notice, but does say that the successful contestant "shall be *allowed* thirty days from date of such notice to enter said lands." (Italics supplied.) What mockery and unfairness, what treachery, would inhere in any regulations of the Land Department, or in any provision of law, that required a person to be notified that he would be *"allowed"* to do what he could not do and what the law forbade any Land Department official to allow him to do.

If there is nothing express or implied in the act of 1880 that prohibits postponement of issue of the notice, or the postponement of the time of exercise of the preference right, until after it is possible for the government to permit actual enjoyment of such right, may this court condemn as unauthorized and unlawful a regulation of the Land Department that does nothing more than insure decent and fair treatment of a citizen who has, at his own expense, purged the Land Department records of a mala fide filing or entry?

In other words, is it possible that the judiciary may so far control the power of the Land Department in purely administrative matters as to say to it, that it shall not by its regulations fix any other time for the issuing of notice to a successful contestant than the date of cancellation of the entry he contested? What is said in United States v. MacDaniel, 7 Peters, 1-14, is illuminating in connection with the criticism by the Court of Appeals of the rule anent postponed preference rights. In said cited case these observations were made:

"A practical knowledge of the action of any one of the great departments of the Government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the Government."

VIII.

THE DEPARTMENT OF THE INTERIOR IS IN FACT A PUBLIC LAND "COURT", AND AS SUCH HAS AN INHERENT POWER, AND IT IS ITS DUTY, TO PRESCRIBE JUST SUCH REGULATIONS AS THE PETITIONERS ARE ATTACKING IN THIS COURT.

The Land Department is a species of court, a quasi-judicial tribunal. Its jurisdiction is only less extensive, territorially, than that of this court. The property and wealth within its jurisdiction and the number of litigants that come before it are larger and more numerous, respectively, than the property and wealth and the litigants that come within the scope of the powers of many courts. In United States v. Schurz, 102 U. S., 167, it was said:

"The Constitution of the United States declares that Congress shall have power to dispose of and

make all needful rules and regulations respecting the territory and other property belonging to the United States, and under this provision the sale of the public lands has been placed by statute under the control of the Secretary of the Interior.

"To aid him in the performance of this duty, a bureau has been created at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress has confided the execution of the laws which regulate the surveying, the selling and the general care of these lands."

In Low et al. v. Katalla Company, 40 Land Decisions, 539, it was said:

"The Interior Department is specifically authorized and empowered to enforce and execute the public land laws of the United States. Sections 441, 453, 2478, revised statutes. The Land Department is a quasi-judicial tribunal and has exclusive jurisdiction over the disposition of lands of the public domain in the absence of specific legislation to the contrary. Bishop of Nesqually v. Gibbon (158 U. S. 155); Knight v. United States Land Association (142 U. S. 616); McDaid v. Oklahoma (150 U. S., 209)."

In a very large measure the Land Department is independent of the judiciary, for instance:

"The decisions of the proper officers of the land department on questions of fact in a contest is conclusive on the courts and, in the absence of fraud in preventing a party from presenting his case, the decision is not subject to review by the courts by a charge of perjury against the witnesses." (Syllabus of opinion in Estes v. Timmons, 199 U. S. 391.

This court must concede, of course, the *inherent* power of so important an agency of government as the Land De-

partment to make rules and regulations. (Cosmos Exploration Company v. Gray Eagle Oil Company, 190 U. S. 301; Lytle v. Arkansas, 9 How. 314.) Not so to concede would be but to question the *inherent* power of the courts to establish rules of practice, as to all practical intents and purposes the Land Department, although a part of the executive branch of the government and controlled by executive and political officers, is nevertheless a court for the trial of public land cases, as under existing laws public land controversies are not possibly triable elsewhere.

CONCLUSION.

This court's decision of February 28, 1921, in No. 495 does not rule its decisions in Nos. 291 and 292. Our reason for this statement is that, in No. 495 the affirmance was, necessarily, as we have fully demonstrated hereinbefore, an approval of a decree below that was granted solely upon the alleged ground, upon what we deem to be the clearly untenable legal proposition, that the 5th section of the act of June 27, 1906, supra, relieved entries of lands within reclamation withdrawals from contests upon the ground of abandonment. *With that statute this court will not need to deal in reaching its conclusions in 291 and 292, unless, of course, it should hold that by reason thereof the Rider entry, which Fleischer (No. 291) contested, and the Arnold entry, which Ocheltree (No. 292) contested, were never lawfully canceled.*

Our final word is this: We have labored to our utmost, we have given all and the best we have, we trust that our contentions will be accepted in the spirit in which they have been made, in that spirit of earnestness and devotion in service to this court which is that of a citizen more interested in the cause of justice under the law than in himself, and far more deeply concerned about his duty to this

court than about success in a case in this court. It is submitted that the concurring opinions below in Nos. 291 and 292 are correct and, therefore, that the judgments based thereon should be sustained and affirmed.

Respectfully,

PATRICK H. LOUGHRAN,
Mills Building, Washington, D. C.,
Attorney for the Respondents in Nos. 291 and 292.

Due service of the within and receipt of two copies thereof, are hereby admitted this ..... day of April, 1921.

....,
Attorney for the Petitioners in Nos. 291 and 292.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

No. 398.

ROBERT L. CULPEPPER, PETITIONER,

vs.

JAMES M. COHEN, FREE.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

PETITION FOR CERTIORARI FILED MARCH 31, 1926.

CERTIORARI AND RETURN FILED JUNE 14, 1926.

(27,357)

(27,587)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 292.

ROBERT L. CULPEPPER, PETITIONER,

vs.

JAMES M. OCHELTREE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript of record from the superior court of Riverside County	1	1
Complaint	1	1
Summons	13	7
Demurrer to complaint	14	8
Judgment	16	9
Certificate to judgment roll	17	10
Notice of appeal	18	10
Minute entry sustaining demurrer	19	10
Clerk's certificate, superior court	19	11
Clerk's certificate, supreme court	21	11
Stipulation to consolidate with case No. 4736 for consideration, &c	22	12
Order of submission	23	12
Order granting leave to file briefs, &c	23	13
Judgment	23	13
Order denying rehearing	23	13
Opinion *per curiam*	24	14
Clerk's certificate	26	14
Writ of certiorari and return	27	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 10, 1920.

a In the Supreme Court of the State of California.

L. A. No. 4962.

ROBERT L. CULPEPPER, Plaintiff and Appellant,

vs.

JAMES M. OCHELTREE, Defendant and Respondent.

From the Superior Court of Riverside County.

Hon. Hugh H. Craig, Judge.

Transcript on Appeal.

Henry M. Willis, San Bernardino, California, J. O. Phillips, Blythe, California, Attorneys for Plaintiff and Appellant.
Duke Stone, Los Angeles, California, Attorney for Defendant and Respondent.

Filed Oct. 4, 1916. B. Grant Taylor, Clerk, by Erb, Deputy Clerk.

1 In the Superior Court of the State of California in and for the County of Riverside.

ROBERT L. CULPEPPER, Plaintiff,

vs.

JAMES M. OCHELTREE, Defendant.

Complaint.

Comes now the plaintiff in the above entitled action, and complaining of the defendant herein alleges:

I.

That the said plaintiff is, and at all times mentioned herein, has been a citizen of the United States, over the age of twenty-one years, and is now, and has been at all times mentioned herein,
2 qualified under the laws of the United States, to make and perfect a homestead entry upon public lands of the United States, under the land laws of the United States.

II.

That on February 10th, 1903, and for a long time prior thereto, the S. W. ¼ of Sec. 12, T. 7 S., R. 22 E., S. B. M., situated in the County of Riverside, State of California, was, among other lands in the same neighborhood, open to entry under the lands laws of the United States.

III.

That on February 10th, 1903, one Danforth Arnold, duly made his homestead entry in the United States Land Office, at Los Angeles, California, on said S. W. ¼ of said Sec. 12, under the homestead laws of the United States: said Land Office then and at all times hereinafter mentioned, being the United States Land Office, having jurisdiction over said lands as provided by law.

IV.

That on or about the 8th day of September, 1903, the said lands, together with other lands in the neighborhood thereof, were duly withdrawn by order of the Land Department of the United States, under and by virtue of an act of Congress approved June 17th, 1902, and known as, and called the "Reclamation Act," from all
3 forms of entry, said withdrawal being what it commonly known as and called, and designated by the Land Department of the United States as, a "First Form Withdrawal;" and that said lands remained so withdrawn under said "First Form Withdrawal," until restored as hereinafter mentioned. That lands so withdrawn under said "First Form Withdrawal" under said act of June 17th, 1902, cannot, under the terms and provisions of said Act, be entered, selected or located in any manner as long as the said lands so remain withdrawn.

V.

That on January 30th, 1908, and while said lands were so withdrawn, one James M. Ocheltree, defendant herein, filed a contest against the said homestead entry of the said Danforth Arnold, on the said lands hereinbefore described, under and by virtue of the laws of the United States and the rules and regulations of the Land Department and subject to the act of Congress of May 14th, 1880, which said contest was recognized by the Land Department of the United States; that the Register and Receiver of the Local Land Office of the United States, at Los Angeles, California, entertained said contest and sustained the same in favor of said defendant, and made its report in due form to the Commissioner of the General Land Office, recommending a cancellation of said entry, that on

September 30, 1908, the then Commissioner of the General
4 Land Office sustained the decision of the Register and Receiver of the said Local Land Office, and cancelled the said homestead entry of the said Danforth Arnold, and directed the said Register and Receiver to advise all parties in interest; that thereafter to-wit, on January 13, 1909, the Register and Receiver of the Local Land Office at Los Angeles, California, duly notified said defendant, James M. Ocheltree, of the cancellation of said entry: and at the same time notified him that he had been awarded a preference right to enter upon the said S. W. ¼ of Sec. 12, T. 7 S., R. 22 E., S. B. M., within thirty days after the said land had been restored to public entry.

VI.

That, thereafter, to-wit, by an order duly made by the Secretary of the Interior of the United States, to-wit, on January 10th, 1910, said lands together with other lands in the neighborhood thereof, were restored to public settlement on April 18, 1910, and to public entry on May 18, 1910.

VII.

That on April 18, 1910, plaintiff herein, being then and there duly qualified under the land laws of the United States to make settlement and to make a homestead entry on open public lands of the United States, made actual settlement on the said S. W. ¼ of Sec.
12, T. 7 S., R. 22 E., S. B. M. in Riverside County, California,
5 said lands being a part of the lands so restored as hereinbefore alleged, with the intention of claiming the same under the homestead laws of the United States; that plaintiff thereby acquired a settler's right under and by virtue of the Act of Congress of May 14, 1880, relating to a settler's right; that he remained thereon as such settler and made his residence thereon, under and by virtue of the laws of the United States, and on May 18, 1910, duly made entry thereon, by filing his homestead application, as such settler, in the United States Land Office, at Los Angeles, California, and paying the fees required by law, and in all respects complied with the laws and rules and regulations of the Land Department, relating to homestead entries, and continued to reside thereon with his family, and make improvements thereon, until dispossessed by said defendant, by a judgment duly made and given in the Superior Court of the State of California, in and for Riverside County, and entered October 14, 1915.

VIII.

That on May 18, 1910, but subsequent to the entry of plaintiff, said defendant James M. Ocheltree made his homestead entry on the same land in the United States Land Office at Los Angeles, California, claiming a preference right so to do, under and by virtue of said alleged preference right theretofore awarded him by the

Register and Receiver of the Local Land Office of the United States,
at Los Angeles, upon the successful termination of said con-
6 test against the entry of said Danforth Arnold.

IX.

That on May 18, 1910, all of said applications to enter and all said entries, were duly suspended by the Land Department of the United States, pending the settlement of a contest between the State of California and the United States of America, as to the character and disposition of said land; that on May 22, 1912, by an order duly made and entered said lands were again restored to public entry, subject to the entries already made thereon.

X.

That thereupon, on May 24, 1912, without hearing and without evidence, and arbitrarily, the Register and Receiver of the Land Office, at Los Angeles, California, rejected and cancelled the homestead entry of plaintiff, and allowed the homestead entry of defendant, on the sole ground that the said defendant had acquired a preference right under the laws of the United States, by reason of the successful termination of the contest theretofore filed and concluded by him as hereinbefore alleged.

XI.

That thereafter plaintiff adopted, used and exhausted all remedies
provided by the laws of the United States, and the rules and
7 regulations of the Land Department of the United States, concerning appeals, and the exercise of supervisory authority, in order to secure his said right as a settler, and as a homestead entryman on said lands, under and by virtue of said settlement and homestead application, but that the officers of the Land Department of the United States refused, and still refuse, to allow him the right he acquired under and by virtue of his settlement on said lands as hereinbefore alleged, and his entry thereon under the homestead laws of the United States hereinbefore alleged; that plaintiff was, at the time of said application, and ever since has been, and still is, duly qualified to make and perfect the right vested in him thereby granted by law; that by reason of, and through the action and decisions of the Officers of the Land Department of the United States, the said entry of plaintiff has been cancelled and denied, and the said entry of the said defendant has been allowed and approved, and patent was, on February 4, 1915, issued by the President of the United States to the said James M. Ocheltree for the said lands, which said patent was recorded in the office of the County Recorder of Riverside County on May 23, 1915, in Book 6 of Patents at page 368, all as a result of the said action and decisions of the Officers of the Land Department of the United States, and not otherwise.

8 XII.

And plaintiff further alleges that he is informed and believes, and upon such information and belief alleges, that the Officers of the Land Department of the United States, to-wit, the then Register and Receiver of the Local Land Office, at Los Angeles, California, who received, recognized and entertained the contest of the said defendant, James M. Ocheltree against the former homestead entry of the said Danforth Arnold, as aforesaid, and who, after hearing said contest recommended to the Commissioner of the General Land Office, that the said entry be cancelled; and that the then Commissioner of the General Land Office who considered said contest, and the recommendation of the Register and Receiver, aforesaid, and cancelled said entry of Danforth Arnold, as aforesaid, and directed said Register and Receiver of said Local United States Land Office, at Los Angeles, California, to advise all parties in interest in said contest, acted wrongfully and contrary to the law, by and through a misconstruction and mistake in the application of the laws of the United States, relative to the acquiring of a preference right by reason of such contest, particularly contrary to the express terms of the Act of Congress of May 14, 1880, wherein and whereby a preference right is declared and created under and by virtue of and subject to the terms of said Act.

9 XIII.

That the said then Register and Receiver of the Local United States Land Office at Los Angeles, California, acted beyond their jurisdiction, and contrary to law, in arbitrarily, and without notice of hearing or trial, cancelling the homestead application of plaintiff herein, as hereinbefore described and set forth, due to a misconstruction and misapplication and misconception of the law relating to the rights vested in this plaintiff by reason of his settlement on the lands described in said application, as hereinbefore alleged, and due to a misapplication and misconstruction and misconception of the law of the United States, relating to the preference right created and designated in said Act of Congress on May 14, 1880, that for the same reason, the then Commissioner of the General Land Office and the then Secretary of the Interior of the United States, in considering and approving and affirming the action and decision of the said Register and Receiver, and of each other, misapplied, misconstrued and misconceived the laws of the United States, relating to the right acquired by said plaintiff in making his settlement and entry as aforesaid; and misapplied, misconstrued and misconceived the purpose of the Laws of the United States in denying the same, and cancelling the same, by virtue of the alleged preference right of the said defendant, awarded him as aforesaid by said officers of the General Land Office, as a result of the successful termination of said contest against the homestead entry of the said Danforth Arnold as aforesaid.

10 XIV.

That the Register and Receiver of the Local Land Office at Los Angeles, and the Commissioner of the General Land Office, and the Secretary of the Interior, in deciding against the right, claimed by said plaintiff, under and by virtue of his settlement and homestead entry, as hereinbefore alleged, and in favor of the said defendant James M. Ocheltree, by virtue of the alleged preference right awarded him, and recognized by the officers of the General Land Office of the United States, acted contrary to law, under and by reason of a misapprehension, a misconstruction, a misconception, and a disregard of the law of the United States, relating to contests and homestead entries, and settlers' rights, and preference rights.

XV.

That all of the Officers of the Land Department as hereinbefore described, in denying plaintiff's right as a settler on the lands hereinbefore described, and the right acquired by him under the land laws of the United States, by reason of said settlement on April 18, 1910, and the filing of his application for homestead on May 18, 1910, and in granting the subsequent application to homestead made by the said defendant, James M. Ocheltree, on the ground that he had theretofore acquired a preference right under the laws of the United States, by virtue of the successful termination
11 of his contest of the prior homestead entry of said Danforth Arnold, was without the jurisdiction of the said Officers of the said Land Department, and was contrary to law, due to a misconstruction, misapplication and misconception of the law on the subject.

XVI.

That by reason of such misconstruction, misapplication and misconception of said laws as aforesaid, this plaintiff has been deprived of, and prevented from attaining title to the said lands embraced within his said homestead application, and that the defendant, James M. Ocheltree, has been granted the title to the same by a patent from the President of the United States, upon the action and decision of the said Officers of the Land Department as aforesaid, and not otherwise.

XVII.

That during all the times herein mentioned, and since April 18, 1910, the plaintiff has been ready, able and willing and qualified, under the laws of the United States, to make and complete and perfect the homestead entry made by him as aforesaid and that he had in fact complied with all the laws and requirements of the laws of the United States, and all the rules and regulations of the Land Department of the United States, relating to home-

steads, except as prevented or prohibited by the Officers of said Land Department, until he was ejected from said premises
12 by judgment of the Superior Court of the State of California in and for the County of Riverside, entered October 14, 1915, as hereinbefore alleged.

Wherefore, plaintiff prays that a decree be entered herein declaring that the defendant holds the title to the lands hereinbefore described in trust for this plaintiff, and that the defendant be required to make a good and sufficient conveyance of said lands, and the title thereto to this plaintiff; and for the reasonable value of the use of said premises since October 14, 1915, and for costs of this action, and for such other and further relief that may, to the Court, seem meet and equitable.

HENRY M. WILLIS AND
J. O. PHILLIPS,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
County of San Bernardino, ss:

Henry M. Willis being first duly sworn, says that he is attorney for the plaintiff in the above entitled action; and has his office in San Bernardino, in the County of San Bernardino; that plaintiff is absent from the County of San Bernardino, and for that reason his attorney makes this verification; that he has read the foregoing Complaint and knows the contents thereof; that the
13 same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and that as to those matters he believes it to be true.

(Signed) HENRY M. WILLIS.

Subscribed and sworn to before me this 24th day of December, 1915.

[Notarial Seal.] FRED A. WILSON,
Notary Public in and for the County of San Bernardino, State of California.

Endorsed: Filed Dec. 27, 1915. A. B. Pilch, Clerk, By O. A. Lowentrout, Deputy.

(Title of Court and Cause.)

Original Summons.

The People of the State of California Send Greetings to James M. Ocheltree, defendant:

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the Superior Court of the County of Riverside, State of California, within ten

days after the service on you of this summons, if served within this county; or within thirty days if served elsewhere.

14 And you are hereby notified unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

Given under my hand and seal of the Superior Court of the County of Riverside, State of California, this 27th day of Dec., A. D. 1915.

[SEAL.]

A. B. PILCH,
Clerk,
By O. A. LOWENTROUT.

Endorsed: Filed Apr. 25, 1916. A. B. Pilch, Clerk, by O. A. Lowentrout, Deputy.

(Title of Court and Cause.)

Demurrer of Defendant

Comes now the defendant, James M. Ocheltree, in the above entitled action and demurs to plaintiff's complaint therein, upon the following grounds:

That said complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.

15 Wherefore, defendant prays the judgment of the Court sustaining this demurrer.

DUKE STONE,
Attorney for Defendant.

(Title of Court and Cause.)

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Dune Stone, of lawful age, being first duly sworn, deposes and says: that he is attorney for the defendant in the above entitled action, and his office as such attorney is located in Los Angeles County, California; that Henry M. Willis, Esq., is the attorney for the plaintiff, and both resides and has his office in San Bernardino, California; that there is a regular system of communication by United States mails between the City of Los Angeles and said City of San Bernardino; that on May 1st, 1916, affiant mailed to said Henry M. Willis, Esq., at his said address, a true copy of the within and attached demurrer by then and there placing said copy of said demurrer in an envelope addressed to said Henry M. Willis at said City of San Bernardino, California, and sealing said envelope and

placing thereon a two cent uncancelled postage stamp, and
16 depositing same in United States mail at Los Angeles, Calif.

DUKE STONE.

Subscribed and sworn to before me this 1st day of May, 1916.

[Notarial Seal.] H. E. WASSELL,
Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Filed May 2, 1916. A. B. Pilch, Clerk. By O. A. Lowentrout, Deputy.

(Title of Court and Cause.)

Judgment.

On May 22nd, 1916, came on to be heard defendant's demurrer to plaintiff's complaint, and plaintiff appeared by Attorney, Henry M. Willis, Esq., and defendant appeared by Duke Stone, Esq., and thereupon after argument of counsel the matter was submitted, and thereafter, on June 9th, 1916, the Court being well and sufficiently advised in the premises finds that the demurrer to plaintiff's complaint is well taken and that the same should be sustained, and it was ordered on said date that the same be sustained, giving the plaintiff ten days' leave to amend, if he so desired; and it appearing to the Court that due notice of sustaining said demurrer was served upon the plaintiff's counsel, and that he has refused to amend
17 said complaint within the time provided by order of the Court, and that he elects to stand upon said complaint.

It is therefore Ordered, Adjudged and Decreed by the Court that the plaintiff take nothing by this suit, and that plaintiff's complaint be dismissed with judgment in favor of the defendant, and for his costs, taxed at $3.00. For which sum let execution issue in favor of the defendant and against the plaintiff.

Dated at Riverside, California, this 24th day of June, 1916.

HUGH H. CRAIG,
Judge.

Endorsed: Filed June 24, 1916. A. B. Pilch, Clerk. By Lyla Palmer, Deputy.

Endorsed: Recorded in Book 20 of Judgments at page 326 the 24th day of June, 1916. A. B. Pilch, Clerk. By Lyla Palmer, Deputy.

(Title of Court and Cause.)

Certificate to Judgment Roll.

STATE OF CALIFORNIA,
County of Riverside, ss:

I, A. B. Pilch, County Clerk of the County of Riverside, State of California, and Ex-Officio Clerk of the Superior Court, in and
18 for said County, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled action, and recorded in Judgment Book 20 of said Court, at page 326. And I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness, my hand and the seal of said Superior Court, this 24th day of June A. D. 1916.

[SEAL.]

A. B. PILCH,
Clerk,
By R. W. RUSSELL,
Deputy.

(Title of Court and Cause.)

Notice of Appeal.

To A. B. Pilch, County Clerk and Ex-Officio Clerk of the Above Entitled Court, and to James M. Ocheltree and Duke Stone, his Attorney:

You will please take notice that the plaintiff hereby appeals to the Supreme Court of the State of California from the judgment entered in the above entitled action on June the twenty-fourth, 1916, and from the whole thereof.

HENRY M. WILLIS,
J. O. PHILLIPS,
Attorneys for Plaintiff.

19 Dated August 18, 1916.

Endorsed: Filed Aug. 23, 1916. A. B. Pilch, Clerk, by E. B. Harris, Deputy.

Minute Order.

Book 33, Page 293, Minutes of Superior Court. Tuesday, June 6, 1916, 10 o'clock A. M.

Present:
Hon. Hugh H. Craig, Judge.
A. B. Pilch, Clerk, by O. A. Lowentrout, Deputy.
F. P. Wilson, Sheriff, by J. F. Reimer, Deputy.

Culpepper vs. Ocheltree.
Demurrer sustained. 10 days to amend.

(Title of Court and Cause.)

Clerk's Certificate.

STATE OF CALIFORNIA,
County of Riverside, ss:

I, A. B. Pilch, County Clerk and Ex-Officio Clerk of the Superior Court in and for said county, hereby certify that I have compared the foregoing transcript with the original papers in the above entitled action now on file in my office, and that the same contains full, true and correct copies of the Judgment Roll, Notice of Appeal from the Judgment, and Minute Order on Demurrer, together with the endorsements on said papers, and documents, as the same appear on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Superior Court this 28 day of Sept., 1916.

A. B. PILCH,
Clerk,
By C. W. JOHN,
Deputy.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Transcript on Appeal in L. A. 4962, Robert L. Culpepper vs. James M. Ocheltree, as shown by the records in my office.

Witness my hand and the Seal of the Court, this 24th day of February, A. D. 1920.

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
Clerk,
By M. C. VAN ALLEN,
Deputy Clerk, Los Angeles Office.

Endorsed.

Service of the within by copy is hereby admitted this — day of September, 1916.

DUKE STONE,
[SEAL.] *Attorney for Defendant and Respondent.*

Received a copy of the within this 28 day of September, 1916, for the Judge of the Superior Court of Riverside County, State of California, who tried the case.

A. B. PILCH,
Clerk of the said Superior Court.
By C. W. JOHN,
Deputy.

[Seal of Supreme Court of California.]

22 In the Supreme Court of the State of California.

L. A., No. 4962.

ROBERT L. CULPEPPER, Plaintiff and Appellant,

v.

JAMES N. OCHELTREE, Defendant and Respondent.

Stipulation.

Whereas the transcript on appeal in the above entitled action has just been filed with the Clerk of the above entitled Court, and whereas the questions to be determined by the Court upon the appeal in said case, are identical with the questions to be determined by the above entitled Court in the case of John McLaren, plaintiff and appellant vs. L. G. Fleischer, defendant and respondent, being L. A., No. 4736, which said case is now ready to be submitted to the Court for its consideration upon a transcript on appeal and written briefs of both appellant and respondent; and whereas the briefs now on file in said case, L. A., No. 4736, contain a full discussion of all the points of law to be determined upon the appeal in the above entitled case.

Therefore it is stipulated by and between Henry M. Willis and J. O. Phillips, attorneys for plaintiff and appellant herein and Duke Stone, attorney for defendant and respondent herein, that the above entitled cause may be consolidated with the case L. A. 4736 and considered and determined by the Court along with said cause upon the briefs now on file therein, and that no further written briefs need be filed in this above entitled cause.

Dated this 6th day of October, 1916.

HENRY M. WILLIS AND
J. O. PHILLIPS,
Attorneys for Plaintiff and Appellant.
DUKE STONE,
Attorney for Defendant and Respondent.

It is so ordered.

_____,
Chief Justice.

23 By the Court:

It is ordered that the cases hereinafter named be and the same are hereby assigned to Department One and in accord with the stipulations on file that the same be and they hereby are submitted on the briefs on file.

L. A., No. 4962. Culpepper v. Ocheltree.

Dated: January 20, 1919.

Minutes of the Supreme Court in Bank, January 20, 1919.

L. A., 4962.

CULPEPPER

v.

OCHELTREE.

By the Court:

The order heretofore made submitting the above entitled causes is vacated, for the purpose of giving leave to file additional briefs. It is ordered that the appellant in each case be allowed thirty days within which to file briefs in reply to this point. Leonard, Surr & Hellyer are allowed fifteen days from the service of such brief within which to reply to the same and thereupon the causes are to stand submitted.

Minutes of Department One June 17, 1919.

L. A., 4962.

CULPEPPER

v.

OCHELTREE.

By the Court:

All of the briefs having been filed pursuant to previous order cause submitted. Shaw, P. J.

Dated, July 22, 1919.

Minutes of Department One July 22, 1919.

L. A., 4962.

CULPEPPER

v.

OCHELTREE.

By the Court:

Judgment affirmed.

Minutes of Department One December 1, 1919.

L. A., 4962.

CULPEPPER

v.

OCHELTREE.

By the Court:

Rehearing denied December 29, 1919. (All concur.)

Minutes of the Supreme Court in Bank, December 29, 1919.

24 Filed Dec. 1, 1919. B. Grant Taylor, Clerk. By —— Erb, Deputy.

Department One.

L. A., No. 4962.

ROBERT L. CULPEPPER, Plaintiff and Appellant,

vs.

JAMES M. OCHELTREE, Defendant and Respondent.

By the Court:

The appeal herein was taken from a judgment of the Superior Court of Riverside County dismissing plaintiff's complaint after demurrer sustained and plaintiff refused to amend. This case was submitted on the briefs filed in McLaren v. Fleischer, L. A. No. 4736, this day decided. The only difference between the two cases is that the defendant herein received notice on January 13, 1909, that he had been successful in his contest and was awarded a preference right to enter the land within thirty days after it should be restored to entry. The defendant in McLaren v. Fleischer received a similar notice on February 11, 1909,—the former notice coming within the time section 7 of the Rules and Regulations of the Land Department of June 5, 1905, were in force and the latter after section 7 had been superseded by section 6 of the Rules and regulations of January 19, 1909.

25 In view of what we have said in McLaren v. Fleischer this difference in the time of receipt of notice is immaterial and therefore upon the authority of that case the demurrer herein is sustained.

Judgment affirmed.

26 In the Supreme Court of the State of California.

L. A., 4962.

ROBERT L. CULPEPPER, Plaintiff and Appellant,

vs.

JAMES M. OCHELTREE, Defendant and Respondent.

I, B. Grant Taylor, Clerk of the Supreme Court of The State of California, do hereby certify that the preceding and annexed is a true and correct copy of the Minute Orders of the Supreme Court in Bank and in Department One, made and entered on the dates therein specified; and a copy of the Opinion of Department One of

said Court; and a Stipulation consolidating above entitled cause with L. A. 4736—McLaren v. Fleischer.

And I further certify that the remittitur in the above entitled cause was issued and sent to the County Clerk of Riverside County, California, on January 2, 1920, as shown by the records of my office.

Witness my hand and the seal of the Court, this 2nd day of April, 1920.

[Seal of Supreme Court of California.]

B. GRANT TAYLOR,
Clerk.
By M. C. VAN ALLEN,
Deputy Clerk, Los Angeles Office.

27 In the Supreme Court of the State of California.

L. A. 4962.

ROBERT L. CULPEPPER, Plaintiff and Appellant,

vs.

JAMES M. OCHELTREE, Defendant and Respondent.

Stipulation on Return to Writ of Certiorari.

Whereas, the Supreme Court of the United States did, on the 6th day of May, 1920, duly issue over the hand of the Clerk, and under the seal of said Court, a Writ of Certiorari in the above entitled action, and directed to the Honorable Judges of the Supreme Court of the State of California, and commanding them to send without delay, to the said Supreme Court of the United States, the record and proceedings in said cause, and

Whereas, the duly certified copies of the said record and proceedings have been heretofore filed in the office of the Clerk of said Supreme Court of the United States, and have been printed as certified, and the printed copies filed as required by the rules of said Court; and

Whereas, the written decision of the Supreme Court of California in said cause, has been printed and filed with the petition for said writ in the office of the Clerk of said United States Supreme Court.

It is therefore stipulated by and between the Appellant and the Respondent herein, through their respective counsel, that the certified transcript of the record and proceedings, and the said decision as printed in said petition heretofore filed, and now on file in the office of the Clerk of the Supreme Court of the United States may be taken and considered as the return to the said Writ of
28 Certiorari, and that a copy of this stipulation, duly certified by the Clerk of the Supreme Court of California, may be

transmitted and taken as the return of said Judges of the Supreme Court of California to said Writ.

Dated May 14, 1920.

HENRY M. WILLIS AND
J. O. PHILLIPS,
SAMUEL HERRICK,
Of Counsel,
Attorneys for Appellant.
DUKE STONE,
Attorney for Respondent.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify in obedience to the writ of certiorari hereto attached and returned herewith, the foregoing to be a true and correct copy of the stipulation of counsel filed in said cause on the 14th day of May, 1920 as shown by the records of my office.

Witness my hand and the Seal of the Court, this 9th day of June, A. D. 1920.

[Seal of Supreme Court of California.]

B. GRANT TAYLOR,
Clerk, San Francisco Office.

29 [Endorsed:] No. L. A. 4962. In the Supreme Court of the State of California. Robert L. Culpepper, Appellant, vs. James M. Ocheltree, Respondent. Stipulation on Return to Writ of Certiorari. Filed May 14, 1920. B. Grant Taylor, Clerk, by —— ——, Deputy.

30 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of California, Greeting:

Being informed that there is now pending before you a suit in which Robert L. Culpeper is appellant, and James M. Ocheltree is respondent, L. A. No. 4962 which suit was removed into the said Supreme Court by virtue of an appeal from the Superior Court of Riverside County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby command you that
31 you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] Original. L. A. 4962. File No. 27,587. Supreme Court of the United States, No. 832, October Term, 1919. Robert L. Culpepper vs. James M. Ocheltree. Writ of Certiorari. Filed May 14, 1920. B. Grant Taylor, Clerk. By Wm. J. Traeger, Deputy.

[Endorsed:] File No. 27,587. Supreme Court U. S., October Term, 1920. Term No. 832. Robert L. Culpeper, Petitioner, vs. James M. Ocheltree. Writ of Certiorari and return. Filed June 15, 1920.

MAR 26 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. [redacted]

ROBERT L. CULPEPPER, *Petitioner,*

vs.

JAMES L. OCHELTREE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAMUEL HERRICK,
HENRY M. WILLIS,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. ———

ROBERT L. CULPEPPER, *Petitioner,*

vs.

JAMES L. OCHELTREE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Robert L. Culpepper, respectfully petitions this Honorable Court to require that the proceedings in a decree of the Supreme Court of the State of California in the case of Robert L. Culpepper, plaintiff and appellant,

vs. James L. Ocheltree, defendant and respondent, L. A. No. 4,962, in said court on appeal from the Superior Court of Riverside County, be certified to this Honorable Court for review and determination, with the same power and authority and with like effect as if brought to this Honorable Court by appeal or writ of error pursuant to law.

This action was brought by the petitioner against the respondent to procure a decree in equity declaring respondent to hold the title to a certain quarter section of land in trust for the petitioner by reason of the latter's settlement made and homestead application tendered prior to the homestead application of the respondent. Relief was denied by the Superior Court of Riverside County, and on appeal to the Supreme Court of California the judgment was sustained upon the ground that respondent had acquired a contestant's preference right of entry while the land was withdrawn under the reclamation act, that such right remained suspended during the withdrawal, preventing the acquisition of any settlement rights, and that it continued in force during a period of thirty days after the reclamation withdrawal was finally revoked.

Under Section 237 of the Judicial Code (36 Stat., 1156), as amended September 6, 1916 (39 Stat., 726), and as construed by this Court in Ireland vs. Woods (246 U. S., 323), a writ of error does not lie in this case and the judgment below is reviewable only by certiorari.

This petition for writ of certiorari is based on the following grounds:

I.

That the opinion of the highest court of the State of California in this cause, holding that the respondent could and did secure a preference right to the land in controversy under the act of May 14, 1880 (21 Stat., 141),

which right took effect after said land had been restored from the reclamation withdrawal, is in direct conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Edwards vs. Bodkin (249 Fed. Rep., 562, 568). The latter case involved land in the near vicinity of that here in controversy, and hence this Honorable Court should take action to bring about a uniformity of decisions.

II.

That under the express provisions of the said act of May 14, 1880, a contestant's preference right must be exercised within thirty days after the notice of the cancellation of the entry contested, and there is no authority in the Secretary of the Interior, either under the reclamation act of June 17, 1902 (32 Stat., 388), or otherwise, to extend this time to thirty days after the land shall have been restored from the reclamation withdrawal under which it was at the time of the contest or at the time of the cancellation.

III.

That the allowance of the preference right aforesaid is also contrary to the Interior Department's Regulations of January 19, 1909 (37 Land Decisions, 565), providing that "no contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest."

IV.

That the petitioner was an actual settler in good faith upon the tract of land here involved in reliance upon the aforesaid Regulations of the Secretary of the Interior, and his rights should, therefore, be protected; whereas, the respondent was a later settler and a later applicant for the land, who relied entirely upon the alleged preference right aforementioned.

In support of this petition, reference is made to the brief this day filed in connection with the like petition in the companion case of Archie J. McLaren, administrator, vs. L. G. Fleischer, said case involving the adjoining tract of land and exactly the same state of facts, except a slight difference in the date of the notice of cancellation of the previous homestead entry. Attention is also called to the fact that there were no printed copies of the State court's decision available for insertion in the certified copy of the transcript of the record, and hence copy of said decision is printed as an exhibit hereto.

Wherefore, your petitioner respectfully requests this Honorable Court to grant the prayer of this petition as set forth in the first paragraph hereof, and that your petitioner may be allowed and receive such other orders as he may be entitled to, and that such decision of the Supreme Court of the State of California may be reviewed and reversed by this Honorable Court.

SAMUEL HERRICK,
HENRY M. WILLIS,
Attorneys for Petitioner.

EXHIBIT A.

OCTOBER.

FILED, DEC. 1, 1919. B. GRANT TAYLOR, CLERK. BY ERB, DEPUTY.

DEPARTMENT ONE.

ROBERT L. CULPEPPER, *Plaintiff and Appellant,*

vs.

JAMES M. OCHELTREE, *Defendant and Respondent.*

L. A. No. 4,962.

BY THE COURT:

The appeal herein was taken from a judgment of the Superior Court of Riverside County dismissing plaintiff's complaint after demurrer sustained and plaintiff refused to amend. This case was submitted on the briefs filed in

McLaren vs. Fleischer, L. A. No. 4,736, this day decided. The only difference between the two cases is that the defendant herein received notice on January 13, 1909, that he had been successful in his contest and was awarded a preference right to enter the land within thirty days after it should be restored to entry. The defendant in McLaren vs. Fleischer received similar notice on February 11, 1909,—the former notice coming within the time section 7 of the Rules and Regulations of the Land Department of June 5, 1905, were in force and the latter after section 7 had been superseded by section 6 of the Rules and Regulations of January 19, 1909.

In view of what we have said in McLaren vs. Fleischer this difference in the time of receipt of notice is immaterial and therefore upon the authority of that case the demurrer herein is sustained.

Judgment affirmed.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 292.

ROBERT L. CULPEPPER, PETITIONER,

vs.

JAMES M. OCHELTREE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF ON BEHALF OF PETITIONER.

The Facts.

The quarter-section of land involved in this case was entered as a homestead in February, 1903, by one Danforth Arnold (R., p. 2), but in September, 1903, was withdrawn under the first form of the Reclamation Act of June 17, 1902

(32 Stat., 388), and remained so withdrawn for nearly seven years thereafter (R., pp. 2, 3).

During this time, and on June 6, 1905, the Interior Department provided by instructions (33 Land Decisions, 607, 609) that:

> "Any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry" (R., p. 24).

In January, 1908, James M. Ocheltree, respondent herein, contested the Arnold entry and through such contest secured its cancellation on September 30, 1908 (R., pp. 2, 3).

On January 13, 1909, the local officers notified Ocheltree of the cancellation of the Arnold entry and that he would be allowed a period of thirty days after the restoration of the land within which to exercise a preference right (R., p. 3).

A few days later, to wit, on January 19, 1909, the Interior Department issued the following General Instructions (37 Land Decisions, 365) in lieu of that above quoted, namely:

> "No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto,* terminate all right that was acquired by reason of such contest" (R., p. 14).

In January, 1910, the Secretary of the Interior directed restoration of this tract and other lands to public settlement

on April 18, 1910, and to public entry on May 18, 1910 (R., p. 3). On the date first mentioned, Robert L. Culpepper, who was fully possessed of all homestead qualifications, established settlement and actual residence upon the said quarter-section, and on May 18, 1910, filed proper homestead application (R., p. 3). Later the same day Ocheltree filed homestead application without asserting any settlement right, but relying wholly on his alleged contestant's preference right (R., pp. 3, 4).

In the controversy which ensued from the filing of these conflicting applications, decisions were rendered by the different bureaus of the Interior Department in favor of Ocheltree, though Culpepper filed successive appeals and exhausted every remedy before the Department, until patent issued to his adversary in February, 1915 (R., p. 4). He also maintained residence upon the land with his family, cultivated it, and made improvements for a period of more than five years, or until ejected therefrom by judicial procedure on October 14, 1915 (R., pp. 3, 4). Promptly thereafter he commenced action in the local courts of California to have a trust impressed on the land in his favor. After final decision against him by the Supreme Court of California (R., p. 14), petition for writ of certiorari was filed in and granted by this honorable court, and the record has now come up for final action (R., pp. 15-17).

ARGUMENT.

The question involved in this case, briefly, is whether or not a contestant's preference right of entry may be extended until thirty days after the land covered thereby has been restored from a first form reclamation withdrawal; and, of

course, there is necessarily involved the question whether any valid contest can be initiated against an entry covering land included within such a withdrawal.

The facts in the present case are practically "on all fours" with those in the companion case of Archie J. McLaren, administrator of the estate of John McLaren, deceased, petitioner, *vs.* L. G. Fleischer, No. 291 of this term, with the single difference that in the instant case notice of cancellation and of preference right was issued to respondent a few days prior to the Department's regulations of January 19, 1909 (*supra*), whereas in the case cited they were subsequent to the regulations. However, Ocheltree had not exercised or attempted to exercise his preference right before the new regulations were issued, and, accordingly, we submit that there is no material difference between this case and the other. Accordingly, we respectfully ask that our argument in the McLaren-Fleischer case be considered here, as we believe that these two cases will be argued and submitted together, just as they were previously submitted on petitions for writs of certiorari.

With a prayer that the decision of the Supreme Court of California be reversed, this case is

Respectfully submitted,

SAMUEL HERRICK,
HENRY M. WILLIS,
Attorneys for Petitioner.

INDEX.

PAGE

Statement 1

Argument 3

I. All the Legal Questions in Nos. 291 and 292 are Identical with some of the Legal Questions in No. 495 3

II. Lawlessness Results in the Conviction of Edwards, Appellee in No. 495, and of Culpepper, Petitioner, in No. 292, for Criminal Conspiracy to Intimidate Bodkin, Appellant, in No. 495. See 223 Fed. 309 . . 11

III. No. 495 was, Beyond Possibility of any Reasonable Doubt, in this Court not otherwise than on an Appeal from Rulings as to the Effect in Law of Facts as Agreed to, and of Uncontroverted Testimony. It was here virtually as Nos. 291 and 292 are here, i. e., on Admitted Facts and for Rulings as to Their Effect in Law 13

IV. Grievously Wronged Would be the Respondents in Nos. 291 and 292, if this Court's Decision of February 28, 1921, in No. 495, should be held to be Determinative of the Issues in their Cases 33

V. In the Petition for Rehearing in No. 495, as well as Herein, we show plainly that the Affirmance in No. 495 was due entirely to nothing else but the Easily Proven, if not Now Obvious, Misconception that said Case had been Presented Here on Questions of Fact 35

VI. McLaren and Culpepper could have Learned at the Land Office in Los Angeles, before they made their Settlements, of the Award of Preference Rights of Entry to Fleischer and Ocheltree 45

VII. The Ultimate and only Real Question in Nos 291 and 292 was the same Ultimate and only Real Question in No. 495, to wit, did a Settlement upon the Land which was Existent on April 18, 1910, Defeat the Pre-existent Preference Right which was Impossible of Exercise until May 18, 1910 46

VIII. The Department of the Interior is in fact a Public Land "Court," and as such has an Inherent Power, and it is its Duty to Prescribe just such Regulations as the Petitioners are Attacking in this Court . . 57

Conclusion 59

STATUTES.

Act of May 14, 1880, 21 Stat. 140 . . . 5, 6, 47, 50

Act of June 17, 1902, 32 Stat. 388 . . . . . 5, 47

Act of June 27, 1906 (5th Sec.), 34 Stat. 519, 520 . . 9, 10, 14, 23, 28, 34, 42

SUPREME COURT DECISIONS.

Bodkin *v.* Edwards, No. 495, October Term, 1920, decided February 28, 1921 3, 4, 8, 14, 15, 36 to 44

Cosmos Exploration Co. *v.* Gray Eagle Oil Co. 190 U. S. 301 59

Estes *v.* Timmons, 199 U. S. 391 58

Knight *v.* U. S. Land Assn. 142 U. S. 161 51

Lytle *v.* Arkansas, 9 How. 314 59

United States *v.* MacDaniels, 7 Peters, 1 56

United States *v.* Schurz, 102 U. S. 378 57

INFERIOR FEDERAL COURT DECISIONS.

Bodkin *v.* Edwards, 265 Fed. 621 . . . . . 24, 31
Edwards, *et al*, *v.* United States, 223 Fed. 309 . 11, 12
Edwards *v.* Bodkin, 241 Fed. 931 . . . . . 15, 16
Edwards *v.* Bodkin, 249 Fed. 562 . . . . . 3, 4, 7, 9, 10, 17, 26, 27, 41, 53
Edwards *v.* Bodkin, 267 Fed. 1004 3, 8, 17, 22, 24, 28

STATE COURT DECISIONS.

Culpepper *v.* Ocheltree, 185 Pac. 971 7
McLaren *v.* Fleischer, 185 Pac. 967 . . . . 2, 7, 8

LAND DEPARTMENT DECISIONS AND REGULATIONS

Beach *v.* Hanson, 40 L. D. 607 55
Brown *v.* Brown, 2 L. D. 259 50
Edwards *v.* Bodkin, 42 L. D. 172 55
Goodwin *v.* Goodin, 47 L. D. 298 40
John T. Slaton, 43 L. D. 212 55
Low *et. al. v.* Katalla Co. 40 L. D. 539 58
Moses *v.* Brown, 2 L. D. 260 50
Regulations of June 6, 1905, 33 L. D. 607 . . . . 9, 35, 47, 48, 49, 52
Regulations of January 19, 1909, 37 L. D. 365 . . 10, 27, 35, 53, 54
Regulations of August 24, 1912, 41 L. D. 171 . . 55
Regulations of September 4, 1912, 41 L. D. 241 . 55
Strader *v.* Goodhue, 31 L. D. 137 51
Wells *v.* Bodkin, 42 L. D. 340 . . . . . 39, 52
Wells *v.* Fisher, 47 L. D. 288 55

IN THE

Supreme Court of the United States.

October Term, 1920

ROBERT L. CULPEPPER, *Petitioner*,
v.
JAMES M. OCHELTREE. } No. 292.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT.

STATEMENT.

This case is here on certiorari to the Supreme Court of the State of California, and presents for decision the merits of a proceeding begun by the petitioner to have the respondent decreed to be a trustee for the former of the legal title to a tract of land which passed from the United States to the latter under a homestead patent issued by the Land Department.

The court of first instance was the Superior Court of Riverside County, California. The complaint was filed December 27, 1915 (R. 1 to 7). From an order sustaining a demurrer to the complaint an appeal was taken on August 23, 1916, to the State Supreme Court (R. 10). The latter court, on December 1, 1919, filed its opinion

in affirmance of the lower court's action (R. 13. See pages 20 to 25 of Record in No. 291). On December 29, 1919, a motion for rehearing was denied (R. 13).

Thereupon this court was petitioned for a writ of certiorari. The petition was granted, the writ issued and the return thereunder was filed here June 15, 1920.

The cause was in the said Superior Court from December 27, 1915, until August 23, 1916—September 28, 1916 (R. 7 to 11). *But it was in the said Supreme Court from September, 1916, until December 1, 1919—January 2, 1920 (R. 12 and 13).* The reason for the seeming long pendency of the case in the State Supreme Court is satisfactorily indicated by the matter at pages 12 and 13 of the Record, where appears a stipulation executed *October 6, 1916*, submitting Nos. 292 and 291 in said Supreme Court "upon the briefs now on file therein." On June 17, 1919 (R. 13), the order submitting the *two* cases was vacated "for the purpose of giving leave to file additional briefs."

The probable real cause for the long pendency of the case in the State Supreme Court was that during the period of its pendency there the case of Edwards v. Bodkin (No. 495 in this court and entitled herein as Bodkin v. Edwards) was pending in the Federal Courts in California. *Reasonably certain is it that the order of the State Supreme Court of June 17, 1919, in Nos. 291 and 292, "giving leave to file additional briefs," was obtained by counsel, for the purpose of endeavoring to impress upon the mind of the State Supreme Court and to persuade it to approve, adopt and follow, the views the Court of Appeals announced through Circuit Judge Morrow on March 8, 1918, in Edwards v. Bodkin (249 Fed. 562) and which, perforce, District Judge Trippett effectuated in his decision of April 9, 1919, in the same case*

(267 Fed. 1004). But the State Supreme Court's opinion, 185 Pac. 967, and its denial of a motion for rehearing, evince anything but favorable notice or consideration of the views of the Court of Appeals or of the action District Judge Trippett thereafter was under compulsion to take, by reason of "the law of the case" doctrine.

ARGUMENT.

I.

ALL THE LEGAL QUESTIONS IN NOS. 291 AND 292 ARE IDENTICAL WITH SOME OF THE LEGAL QUESTIONS IN NO. 495.

This court's decision of February 28, 1921, in No. 495 has not only affirmed decisions which the Department of the Interior has wisely and justly refused, and will continue to refuse, to follow, because of an unsoundness therein that is palpable, but its affirmance thereof was made under the serious and extraordinary misapprehension that the decisions were rendered in cases that went to a hearing and determination on questions of fact.

That misapprehension, unless perceived by this court, will inevitably eventuate in numerous speculative and even champertous suits, and also cause the bench below and the bar, to the extent that the latter is familiar with No. 495, to be able to say, with absolute accuracy, that a case which was heard and determined below upon very important questions of law exclusively, and which was brought here on questions of law exclusively, was, nevertheless (AND UNDER A MOTION TO DISMISS OR AFFIRM, WHICH FAILED TO SET OUT A SINGLE VALID REASON FOR GRANTING THE

SAME, AND WHICH CONTAINED NOT THE SLIGHTEST HINT OR SUGGESTION THAT THE DECISIONS BELOW TURNED ON QUESTIONS OF FACT, AND WHICH WAS IGNORED BY BODKIN'S COUNSEL BECAUSE IT WAS PLAINLY FRIVOLOUS), decided here because of the unfounded assertion here, due to misappresension, that the decisions below turned on questions of fact.

Like two peas in a pod, separate entities but of the same substance, are the complaints in Nos. 291 and 292. They were drafted by the same hand, originated in the same brain, have the same number of paragraphs, contain the same prayers, are of the same length, are subscribed by the same learned counsel, and were filed on behalf of absent plaintiffs. *They will serve admirably as forms for use in many similar suits, should this court fail to make it evident that it did not by its affirmance of February 28, 1921, in No. 495, Bodkin v. Edwards, approve and confirm "the law of the case" as expounded by the Circuit Court of Appeals, speaking through Circuit Judge Morrow, in 249 Fed. 562.*

The complaint in this case (No. 292) was verified by counsel for Culpepper, because "the plaintiff is absent from the County of San Bernardino." The complaint in No. 291 was also verified by the same counsel on behalf of an absent client. From the complaint the following material allegations are gleaned, to wit:

A. One Danforth Arnold (who is in no wise at interest in this litigation) made a homestead entry of the land in suit on February 10, 1903 (R. 2).

B. The land so entered was withdrawn under "first form" on September 8, 1903, in aid of the purposes of the Reclamation Act of June 17, 1902, 32 Stat. 388 (R. 2).

C. January 30, 1908, Ocheltree, the respondent here, filed a contest against the Arnold entry (R. 2).

D. September 30, 1908, the General Land Office canceled the Arnold entry under the Ocheltree contest (R. 3).

E. January 13, 1909, the register and receiver of the United States Land Office at Los Angeles, California, notified Ocheltree that by reason of his successful contest he had earned a right of preference of entry of the land in suit under the second section of the act of May 14, 1880, 21 Stat. 140, which he might exercise within thirty days after abatement of the "first form withdrawal" and after the land had been restored to public entry (R. 3).

F. The land was restored to settlement April 18, 1910, and to entry May 18, 1910 (R. 3).

G. April 18, 1910, Culpepper, the petitioner here, made settlement on the land (R. 3).

H. May 18, 1910, Culpepper applied for a homestead entry of the land (R. 3).

I. May 18, 1910, Ocheltree applied for a homestead entry of the land in exercise of his said right of preference of entry (R. 3).

J. May 18, 1910, all applications were suspended pending a government inquiry as to the official survey of the land (R. 4).

K. May 22, 1912, such suspension was revoked (R. 4).

L. May 24, 1912, Ocheltree's application for entry was allowed and Culpepper's was rejected (R. 4).

M. Thereafter Culpepper "exhausted all remedies" * * * in the Land Department "to secure his said right as a settler" (R. 4).

N. February 4, 1915, a patent for the land was issued

to Ocheltree under the entry which he was allowed to make on May 24, 1912 (R. 4).

O. That the officers of the land department "acted wrongfully and contrary to law" and prejudicially to Culpepper in the premises, in that they refused to recognize the right he acquired by virtue of his settlement on the land on April 18, 1910 (R. 4).

P. That the conduct of the land department was "particularly contrary to the express terms of the act of Congress of May 14, 1880," supra, because, forsooth, the said department had held that Ocheltree, by reason of his successful contest against the Arnold entry, had earned a right to enter the land in preference over all others for a period of thirty days after May 18, 1910 (R. 5).

Q. That the several decisions of the land department in the matter "misapplied, misconstrued and misconceived the laws of the "United States" applicable to Culpepper's settlement on the land on April 18, 1910, and to Ocheltree's successful contest against the Arnold entry (R. 5).

R. That the alleged errors of the land department prevented Culpepper from obtaining title to the land and led to the unlawful passing of title thereto to Ocheltree (R. 6).

Here seems to be the appropriate place to show what the State Supreme Court perceived as the only difference worthy of notice between the facts of this case, No. 292, and the facts in No. 291. Said court made this observation:

> "The only difference between the two cases is that the defendant herein (Ocheltree, in No. 292) received notice on January 13, 1909, that he had been successful in his contest and was awarded a preference right to enter the land within thirty days after it should be restored to entry. The defendant in

McLaren v. Fleischer (No. 291) received a similar notice on February 11, 1909—the former notice coming within the time section 7 of the rules and regulations of the Land Department of June 5, 1905, were in force and the latter after section 7 had been superseded by section 6 of the Rules and regulations of January 19, 1909.

"In view of what we have said in McLaren v. Fleischer this difference in the time of receipt of notice is immaterial and therefore upon the authority of that case the demurrer herein is sustained.

"Judgment affirmed." (R. 14 in No. 292, 185 Pac. 971.)

The ultimate question in Nos. 291 and 292 was stated by the State Supreme Court (R. 23 and 24 in No. 291) to be this:

> "The sole question, therefore, which is presented for determination here is whether the officers of the land department made a mistake of law in granting the defendant a preference right, in the recognition of which it became necessary to cancel plaintiff's entry" (i. e., to reject plaintiff's application to enter, for plaintiff had never been allowed an entry).

Of course the State Supreme Court felt constrained to notice in its opinion the previous rulings of the Circuit Court of Appeals, speaking through Circuit Judge Morrow, in Edwards v. Bodkin, 249 Fed. 562. In its notice and discussion of those rulings (R. 25 in No. 291) it said this:

> "Appellant relies upon Edwards v. Bodkin, 249 Fed. 562, in support of his claim that the preference right was awarded to the respondent through a mistake of law. The decision there was not to the effect that the contestant was by mistake of law given the

> preference right. *It was there held that the Commissioner of the General Land Office had* MISTAKEN THE LAW *in declaring* that the settler had abandoned his homestead claim." (Capitals and italics supplied.)

When it is clearly in one's mind that the State Supreme Court's opinion, 185 Pac. 967, was filed December 1, 1919, and that said date was about eight months subsequent to District Judge Trippett's decision of April 9, 1919, and about five months subsequent to the said District Judge's decision of July 24, 1919, on rehearing, in Edwards v. Bodkin, 267 Fed. 1004, *it will be as obvious as the existence of Deity that the State Supreme Court never intended that its opinion should be understood as containing a statement to the effect that the Federal Courts, in Edwards v. Bodkin, had actually reviewed the testimony taken in the contest proceeding between Bodkin and Edwards in the Land Department and had found that such testimony was without any, or legally sufficient, evidence to sustain the findings of fact the Land Department had made in that proceeding and, therefore, that said Department had "mistaken the law."*

Nor will one who reads intelligently the opinion of the State court conclude therefrom that said court believed, as this court in its decision of February 28, 1921, in No. 495, said it believed, that the Federal Courts had decided Edwards v. Bodkin because those courts had found that the Land Department had not considered matters presented to it by Edwards, which it should have considered. In short, the State court apprehended what was the actuality, viz, that the Federal courts in effect had conceded that THE LAND DEPARTMENT HAD NOT MISTAKEN OR MISSTATED THE FACTS, BUT HAD "OVERLOOKED" OR "MISUNDERSTOOD" THE EFFECT THEREOF IN LAW.

The State tribunal's utterance reflected a truly scientific appreciation of the rationale of the views of the Federal courts. *It actually knew that what the Federal Courts had said was this, that the 5th section of the act of June 27, 1906, 34 Stat. 519, 520, relieved homestead entries from contest upon charges of abandonment and that the Land Department had "misunderstood" or "overlooked" that legislation* AND, THEREFORE, HAD MISTAKEN THE LAW WHEN IT PERMITTED BODKIN TO INITIATE AND MAINTAIN HIS CONTEST AGAINST EDWARD'S ENTRY.

Courtesy possibly inspired the State Supreme Court to desist from express dissent by it from those other rulings of the Federal courts in Edwards v. Bodkin which, if the State court had deemed them sound and followed them, would inevitably have caused the State court to hold and decide entirely to the contrary of what it did hold and decide. For instance, in 249 Fed. 562, 567, it was expressly ruled that the Interior Department's regulations of June 6, 1905, 33 L. D., 607, were invalid to the extent that they provided for the exercise of a contestant's preference right at any time within thirty days after restoration of land to entry. Those regulations, as the Federal Court said, were tantamount to an attempt "to amend, modify or change the act of May 14, 1880."

The same regulations were before the State Court and were discussed by it in Nos. 291 and 292 (after they had thus been condemned by the Federal Court) but the State Court held that they were lawful and reasonable. If the contrary of that had been the State Court's holding then, of course, said court and the Federal Court would have been in agreement, and there could not have appeared in the petition for certiorari which was filed in this court in Nos. 291 and 292 this observation, to wit:

> "that the opinion of the highest court of the State of California in this cause, holding that the respondent could and did secure a preference right to the land in controversy, under the act of May 14, 1880, 21 Stat. 141, which right took effect after said land had been restored from the reclamation withdrawal, is in direct conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Edwards v. Bodkin, 249 Fed. 562, 568" (pp. 2 and 4 of the petition for certiorari in No. 291).

Nor did the State Court find it possible to abide the conclusion of the Federal Court, 249 Fed. 562, 569, to the effect "that whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909," 37 L. D., 365. *It is very likely that the State Court instantly perceived the force of the proposition that if any statute right whatsoever had been acquired, it was utterly incompetent for the Land Department, by a regulation, to destroy or nullify it.*

From the foregoing it must be apparent that the only legal questions in No. 495 which are not also present in Nos. 291 and 292 are these, to wit:

A. Was the Federal Court accurately stating the law when it said, 249 Fed. 562, 566, that an affidavit of contest which is in fact executed on information and belief, but which appears to have been executed on personal and actual knowledge, "insufficient to initiate a contest," notwithstanding corroboration thereof by a person deposing on personal and actual knowledge. (See pages 34 and 35 of Record in No. 495 for a copy of the affidavit of contest Bodkin filed against Edward's entry.)

B. Was the Federal Court faithfully interpreting the law when it said, 249 Fed. 562, 567, that the 5th section of the act of June 27, 1906, supra, relieved homestead entries from contest and cancellation for abandonment?

II.

LAWLESSNESS RESULTS IN THE CONVICTION OF EDWARDS, APPELLEE IN NO. 495, AND OF CULPEPPER, PETITIONER IN NO. 292, FOR CRIMINAL CONSPIRACY TO INTIMIDATE BODKIN, APPELLANT IN NO. 495. SEE 223 FED. 309.

The complaints in Nos. 291 and 292 represent that the plaintiffs in those cases resisted the rulings on their claims which were made by the Land Department, even to the extent of remaining in possession of the lands claimed by them, respectively, until removed through legal processes obtained in possessory actions instituted by the defendants (R. 13, in No. 291 and R. 3, in No. 292). But it is not stated in the complaint in No. 292 that the plaintiff in that case was indicted, tried and convicted for conspiracy with Edwards, the plaintiff below in No. 495, to intimidate Bodkin, the defendant below in No. 495, in the enjoyment of a right secured under the laws of the United States. However, it is admitted in Edwards' complaint in No. 495, in language abusive of all officers of the law who afforded the protection of the law to Bodkin, that he, Edwards, was convicted of and imprisoned for said offense (R. 8 in No. 495).

The said two defendants in the said criminal action obtained a review by the Circuit Court of Appeals of the judgment of conviction. They were represented in the criminal action by the same attorneys who appear for them in the civil actions they instituted, respectively, and which civil actions (Nos. 292 and 495) have come before this court. The essence of their defense in the criminal action, as is inferrable from the decision of the said Court of Appeals affirming the conviction, 223 Fed. 309,

was that Bodkin had not acquired a preference right of entry by reason of his successful contest against Edwards' entry; that Bodkin had not become entitled to an entry of the land, and that the only one entitled to entry of the land and to possession thereof was Edwards.

The said criminal action was reviewed in said Court of Appeals upon an exception to an instruction given by the trial court, "as well as the refusal of the court to give an instruction embodying the opposite view of the law," 223 Fed. 309, 311. The instruction given was that "Bodkin, by virtue of the allowance of June 1, 1912," * * * "of his application previously filed" * * * "to enter as a homestead," * * * "acquired the right" * * * "to make settlement and residence upon said land." In the argument on behalf of the convicted conspirators it was contended, in substance, that the allowance of an entry in the exercise of a successful contestants' preference right *"long after the 30-day notice required by law,* but after the restoration of said lands to entry" did not "confer such a right as is embraced within the terms of section 19 of the Penal Code of the United States."

After stating that the record before it did not disclose the date of cancellation of Edward's entry, nor the date of the notice to Bodkin of his accrued right of a preference of entry, the Court of Appeals, "finding no prejudicial error in the record," affirmed the judgment of conviction. *The record in No. 495 in this court shows that Edward's entry was canceled April 19, 1910, which was after abatement of the first form withdrawal and after execution of the order of restoration of the land to the public domain, and that the notice to Bodkin of his preference right was given subsequent to that date* (R. 49 in *No. 495*). *Therefore Bodkin's preference right application, which was filed May 18, 1910, was actually filed*

within the thirty days allowed by law for its filing. (R. 55 in No. 495.)

Is it not a moral certainty that those facts were well known to the conspirators and to their counsel at all times during and after the trial of the criminal action? If so known, was the Court of Appeals aided or its labors increased, by an argument from counsel which contained the assertion that:

> *"The question raised,* briefly stated, is: Is the action of local land officials in permitting and receiving the filing of a homestead application, based solely upon a preference right of entry, theretofore awarded to the applicant by the Land Department at the successful termination of a contest of an entry upon lands, *while withdrawn from all form of public entry under the Reclamation Act,* and the allowance by the local land officials of such homestead entry upon such preference right, *long after the 30-day notice required by law,* but after the restoration of said lands to entry, within the jurisdiction of the land officials, and does such action confer such a right as is embraced within the terms of section 19 of the Penal Code of the United States?" (Italics supplied.)

III.

NO. 495 WAS, BEYOND POSSIBILITY OF ANY REASONABLE DOUBT, IN THIS COURT NOT OTHERWISE THAN ON AN APPEAL FROM RULINGS AS TO THE EFFECT IN LAW OF FACTS AS AGREED TO, AND OF UNCONTROVERTED TESTIMONY. IT WAS HERE VIRTUALLY AS NOS. 291 AND 292 ARE HERE, *i. e.*, ON ADMITTED FACTS AND FOR RULINGS AS TO THEIR EFFECT IN LAW.

In adjudicating the Bodkin-Edwards case, this court erroneously supposed that it had been adjudicated in the courts below upon a finding by the courts below that the Land Department had not considered matters presented to it by Edwards, which it should have considered. But there not having been any such adjudication below in said case, *and the record in said case showing clearly that the Land Department had heard and re-heard everything Edwards had ever presented to it*, we respectfully submit here for the consideration of this court the proposition, that its affirmance of February 28, 1921, in No. 495 cannot from any truly scientific and logical viewpoint, although it might upon the basis of technicalities and fictions unknown to us but which jurisprudence possibly recognizes and enforces, be regarded and treated by bench and bar otherwise than as an unqualified approval and unreserved confirmation by this court of the views of the courts below on the matters of law which those courts held were *controlling* in No. 495.

In other words, as the courts below very clearly and painstakingly indicated that their decisions against Bodkin were based solely upon their rulings that he had never initiated a contest in the Land Department, because (1st) his affidavit of contest, although not so appearing, was executed on information and belief, and (2nd) that, even if it had been executed on personal knowledge, the affidavit of contest could not be allowed because, forsooth, the 5th section of the act of June 27, 1906, 34 Stat. 519, 520, forbade a contest—we submit that it is logically impossible for this court's decision of February 28, 1921, to have been an affirmance, without also and necessarily having been the effective means whereby Bodkin has been deprived of his property and Edwards invested with the title thereto owing to nothing else but the views of the

courts below on questions of law exclusively. *It is inescapable, we think, that this court has fully concurred in and completely committed itself to such views on matters of law.* BUT THE SUPREME COURT OF THE UNITED STATES WOULD NOT THUS HAVE COMMITTED ITSELF TO DEMONSTRABLE FALLACIES IN LEGAL REASONING IF IT HAD NOT MISCONCEIVED THE CHARACTER OF NO. 495.

IN OUR DEMONSTRATION OF THE FALLACIES WHICH THE SUPREME COURT OF THE UNITED STATES HAS, INADVERTENTLY, CAUSED TO BE TREATED AS VERITIES, WE WILL HERE REVIEW THE HISTORY OF BODKIN V. EDWARDS. District Judge Bledsoe's decision in 241 Fed. 931 discusses Edwards' complaint (the one in No. 495) with thoroughness. Said decision held that the malicious onslaughts by the maligning Edwards upon Department of the Interior officials and upon Department of Justice officials (vide paragraphs 2, 5, 12, 14, 15, 17, 20, 22, 23, 26, 32, 33 and 34 of the complaint at pages 2 to 10 of the R. in No. 495) were "most general and inconclusive assertions with respect to fraud" and afforded no basis for judicial inquiry as to whether "any fraud was actually committed or that any mistake of law in the overruling of the plaintiff's protest was indulged in" by the Land Department, or as to whether any mistake or misstatement of fact was made by said department in its findings in the contest proceeding. *Judge Bledsoe understood that the sole alleged ground for revision and change by the judiciary of the Land Department's findings in the contest proceeding was fraud on the part of officers of that Department in making the findings, and that no alle-*

gation in the bill of complaint (in No. 495) *was of a character warranting judicial inquiry as to those findings with view to determining whether they should be revised.*

As to the issue of law in the case the said Judge remarked:

> "The main question in the case centers around the right of the Department of the Interior to allow the preferential right inuring to the successful contestant of an entry upon public lands to attach and be taken advantage of after the lands have been restored to entry subsequent to a 'first form' withdrawal under the act of June 17, 1902, 22 Stat. 388." 241 Fed. 931, 933.

Judge Bledsoe's views on that issue of law were expressed thus:

> "In my judgment, the action of the Department in holding that the right accrued as of the date of restoration of the land to the public domain was a correct application of the law in the premises." 241 Fed. 931, 934.

The report of Judge Bledsoe's opinion in the Federal Reporter does not show that he expressly stated therein that Edwards might amend his complaint. Ordinarily an amendment would be permitted. By electing to appeal (if there was election owing to no express or implied refusal to allow an amendment of the complaint), Edwards chose to stand on his pleading. *Whether that pleading duly presented any question of fact whatsoever which the judiciary could properly regard as entitling Edwards to a decree was clearly decided in the negative by Judge Bledsoe.*

The last two paragraphs of the opinion of the Court of Appeals on the appeal to it *from Judge Bledsoe's rul-*

ing, which opinion was delivered by Circuit Court Judge Morrow, 249 Fed. 562, 570, 571, are these:

> "The motion to dismiss was made on the ground that the complaint does not state facts sufficient to constitute a cause of action. We think the complaint is not so defective as to justify its dismissal. It does state facts sufficient to constitute a cause of action, but the facts are imperfectly stated, and with respect to the proceedings in regard to the defendant's lieu land selection are not fully stated.
>
> "The judgment is reversed, with direction to deny the motion to dismiss, and with leave to plaintiff to amend his complaint, if so advised."

WHEN THE CASE CAME AGAIN BEFORE THE DISTRICT COURT, DISTRICT JUDGE TRIPPET VERY WISELY REMARKED THAT "UNDER THE DECISION OF THE CIRCUIT COURT OF APPEALS (249 FED. 562) HE (BODKIN) HAD NO RIGHTS TO BE CONSIDERED." 267 FED. 1004, 1009.

It is of first importance that we inquire diligently here as to what it was that influenced Judge Trippet to say that the decision in 249 Fed. 562 was an adjudication that Bodkin "had no rights to be considered." In such inquiry the first matter for ascertainment is the true character of the grounds upon which Edwards rested his bill of complaint, for it was with respect to those grounds, and with respect to them alone, that the Court of Appeals decision on the appeal from the order dismissing the complaint so expounded the law as to leave Bodkin without any rights to be considered.

Edwards' complaint was grounded entirely upon the proposition that the homestead entry he made on December 1, 1902, was not lawfully canceled on Bodkin's con-

test because, forsooth, *the Land Department was without authority of law to permit a contest proceeding against it.* (Pars. XI and XX of complaint, at pages 4 and 6 of the R. in No. 495, respectively). His complaint rests his case upon whatever rights continued in him under his entry, despite the cancellation thereof by the Land Department. This is evident from these allegations of Edwards' complaint (references being to the record in No. 495), to wit:

A. That he made homestead entry December 1, 1902 (R. 1).

B. That he made a final proof under the entry on April 23, 1909, which he alleges the Land Department refused to consider. (Such alleged proof was made after hearing in the contest, and after decision therein by the Register and Receiver. R. 37. The department fully considered the proof, R. 50 to 52.)

C. That the Land Department promulgated regulations in 1905 governing the contesting of homestead entries of land within reclamation withdrawals, which were violative of law (R. 4).

D. That Bodkin's affidavit of contest was executed on information and belief (R. 5).

E. That Edwards was upon the land when served with notice of Bodkin's contest (R. 5).

F. That *"at the hearing of said contest if was found, conceded and established* WITHOUT DISPUTE that plaintiff had established residence, had made improvements," et cet. (This allegation is obviously false in the light of the decisions of the Land Department in the contest. R. 37 to 43.)

G. That before actual cancellation of his entry on the Bodkin contest, the Interior Department, in 1909, promulgated a regulation which provided "that in all cases where

contest had been allowed, if preference right had not been used thereunder, such regulation would ipso facto terminate all right futurely promised by the prior (1905) regulations" (R. 5 and 6).

H. That on June 1, 1912, the Land Department allowed a homestead entry to Bodkin "solely because of the bias and prejudice aforesaid" (R. 6).

I. That the department denied him due process in his contest against Bodkin's preference right homestead entry (R. 9). The fact is that the department duly heard the said contest (R. 53).

J. That Edwards protest against Bodkin's "scrip" locations was arbitrarily denied. (R. 9. The fact is that the department duly heard the protest. R. 59 to 64.)

Some of the matter which Edwards thrust upon Judge Trippet's notice in an attempt to prove such of the foregoing allegations as are not statements of conclusions of law, was deliberately omitted from the record in this court in No. 495, with the passive or tacit, if not active or express, approbation of counsel for Edwards who, by not specifying it in his praecipe for the record, seemed to us, at least, to have *agreed with us that it was utterly without materiality under any allegation of fact in his client's complaint as well as utterly detached from and foreign to the basis, or any part of the basis, for the conclusions reached by Judge Trippet and the rulings thereafter made by the Court of Appeals, when it spoke through District Judge Wolverton.*

The matter or "evidence" omitted from the record in No. 495 in this Court was the testimony taken in the contest proceeding between Bodkin and Edwards in the Land Department, the colloquy between counsel and Judge Trippet before such testimony was put in, copies of the pleadings and notes of the proceedings in the State

Court in the possessory actions and the copies of the three patents that issued to Bodkin. (The propriety of a reference by us here to what was omitted from a record in another case in this court could be questioned, if the other case were not one which, as we sincerely believe, this court might desire that we discuss here in view of our petition for rehearing therein. We have filed in the office of the Clerk of this court a certificate by the Clerk of the Court of Appeals as to every word and figure omitted from the record in this Court in No. 495.)

We do not intend to discuss the obvious in this court. Therefore we shall not dilate on the uselessness, in a judicial sense, of the presence in a record of a case of the nature of No. 495, of the copies of the patents to Bodkin and of the matter relative to the possessory actions. *But we must, because it is not less our duty to this court than to our clients in Nos. 291 and 292, make it indisputably clear that there were valid reasons for omitting from the record in No. 495 the testimony which was taken in the contest between Bodkin and Edwards in the Land Department.*

Why the testimony taken in the contest proceeding between Bodkin and Edwards in the Land Department was omitted from the record in No. 495 will become apparent upon reflection on these facts:

A. Nowhere in the bill of complaint in No. 495 will there be found a single allegation that the Land Department's findings of fact were without any evidence whatever to support them.

B. Nowhere in said bill of complaint will there be found a single allegation that Bodkin, or anyone else, committed a *specified* act in fraud upon the Land Department that resulted in the obtaining from it of the findings of fact it made.

C. Nowhere in said bill of complaint will there be found a single allegation of a fact which, if true, would show that Edwards was denied a day in court in the contest proceeding, or was denied due process in any particular.

D. Nowhere in said bill of complaint will there be found a single allegation that the facts as found by the Land Department and accepted as the facts in the case, are wholly insufficient in law to sustain a ruling thereon that there had not been the residence upon the land and the cultivation thereof by Edwards *that the statutes required in 1907 to 1911 in the maintenance of the ordinary homestead entry.*

The only possible basis which the courts below could find, or this court can find, for reviewing the Land Department's findings of fact are the allegations in Edwards' complaint that the many Land Department decisions against him and other fancied wrongs were due to Bodkin's "friendly relations with certain Land Department officials (R. 5), to "the assurances given the defendant and in aid of his speculative program, department officials decided that abandonment was proved" (R. 5), to "field agents of the department" * * * "making wrong reports concerning plaintiff and showing partisan zeal in many ways" (R. 5), to "a conspiracy" between Land Department officials, Department of Justice officials and others (R. 7), to oppression and coercion from a United States Attorney (R. 7), to intimidation of a local court by a United States Attorney (R. 8), to "manufactured evidence" (R. 8), to "discrimination against him in proceedings before the Land Department" (R. 9), to "bias and prejudice culminating in a conspiracy" (R. 10), to "the most extreme prejudice and partisan intent" (R. 10), and to "the voluntary and involuntary fraud to which plaintiff has been subjected" (R. 10).

Those serious charges were made against the very officers of the Land Department who, throughout several years, patiently heard, painstakingly considered and calmly and impartially determined the many and varied attacks which Edwards had made, in actual abuse of the processes of the Land Department, against Bodkin. *But not the slightest attempt was made to substantiate those serious charges. Judge Trippet, doubtless deeming it but an act of simple justice to the said officials of the government, made this observation:*

> "The plaintiff offered no proof regarding the misconduct of any of the officers of the Land Department" (R. 74).

As there was no proof offered of wrong doing by the government in the matter, of course there was no judicial review and revision of the Land Department's findings on the ground of irregularity. *Why, we ask, in view of the foregoing circumstances, should a man who is sued by an alleged pauper have paid for the printing in this court of about 160 pages of matter which, as is obvious, had not the slightest effect on the deliberations of the courts below?*

If all the testimony given from the witness chair in the District Court in No. 495 (R. 65 to 71 in No. 495) were accepted at its face value (there being absolutely nothing therein to show fraud practiced upon the Land Department or arbitrariness practiced by it), it would be impossible to say with respect to it that it warranted the judiciary in revising, modifying or changing the Land Department's findings of fact. *Is it supposable that any court would disregard or ignore, or impute error to, the Land Department's findings of fact in a case which involved the patenting of a tract of land to one of two rival*

claimants, upon only such wholly uncorroborated and duly objected to testimony, having pertinence exclusively under the issues of fact which were duly heard and determined in the Land Department as was given from the witness chair in the District Court in No. 495 by the man who was adversely affected by those findings, who had maliciously questioned the integrity of sundry Government officials, who had been convicted of criminal conspiracy and who, himself, together with others, without let or hindrance, testified in the proceeding in the Land Department that eventuated in the findings?

What then is apparent on the face of the decisions below as to what was held concerning the Land Department's findings of fact? *On the face of those decisions, in the express language thereof, it was held that the 5th section of the act of June 27, 1906, 34 Stat. 519, 520, relieved reclamation act homestead entries from contest on a charge of abandonment. From that holding it logically followed that it was a matter of no concern to the courts below whether the Land Department had or had not made findings of fact in a Bodkin-Edwards contest proceeding, and therefore, and because Edwards' bill of complaint had not so impeached the findings as to warrant a judicial inquiry as to them, there was no review of said findings by any court below and no implication in the decision by either that there was such review.*

When the Supreme Court of the United States affirms, it concurs in a conclusion reached and a judgment given by the lower court. The affirmance presupposes knowledge of the basis for the conclusion or judgment announced below. The affirmance approves and confirms such basis. If the basis be in fact exclusively, the court accepts the fact as found below. If the basis be in law

exclusively, the court sanctions and approves the rulings in law as made below.

AN APPELLATE COURT, BY AN AFFIRMANCE, CANNOT CHANGE THE CHARACTER OF THE CASE BELOW FROM ONE WHICH WAS DECIDED BELOW ON QUESTIONS OF LAW TO ONE WHICH WAS DECIDED BELOW ON QUESTIONS OF FACT. STATED WITH APPOSITENESS AS TO NO. 495, OUR PROPOSITION IS THIS: THAT IF THE DECISION OF DISTRICT JUDGE TRIPPET, 267 FED. 1004, AND THE DECISION OF THE COURT OF APPEALS, SPEAKING THROUGH DISTRICT JUDGE WOLVERTON, 265 FED. 621, IN THEIR EXPRESS AND UNMISTAKABLE TERMS, ARE CONCURRING DECISIONS UPON QUESTIONS OF LAW WHICH ARE DETERMINATIVE OF THE MERITS OF THE CASE OF EDWARDS V. BODKIN, IT UNAVOIDABLY FOLLOWS FROM THE AFFIRMANCE OF THOSE DECISIONS BY THIS COURT THAT IT HAS CONCURRED IN AND CONFIRMED THE RULINGS MADE IN THOSE DECISIONS ON QUESTIONS OF LAW, REGARDLESS OF THE STATEMENT IN THIS COURT'S AFFIRMANCE THAT THE DECISIONS BELOW WERE CONCURRING DECISIONS ON QUESTIONS OF FACT WHICH WERE DETERMINATIVE OF THE CASE OF EDWARDS V. BODKIN.

The social law of simple courtesy would require the judiciary, when revising, altering, changing or disregarding the findings of fact made by one of the more important branches of the executive department of our government, to state explicitly the considerations that moved it to conclude that such findings were without due, or any foundation, in the law. If Judge Trippet revised any of

the findings of fact made by the Land Department, he gave not the slightest hint that he had revised the following finding which was made by the First Assistant Secretary of the Interior, to wit:

> "He (Edwards) evidently did considerable work on the land, in cultivating, digging brush, et cet.; *but this work was after he had personal knowledge that the contest had been filed*" (R. 43).

It is not believable that any enlightened court, without stating fully and clearly its reasons for so doing, would have rejected as being without due or any evidence to support it the following findings of fact made by the General Land Office in the contest proceeding between Bodkin and Edwards, to wit:

> "Defendant had knowledge of the pending contest against his entry, prior to the time he returned to the claim, as plaintiff had mailed him a letter on March 26, 1908, informing him of the contest, and requesting him to sign and return a relinquishment inclosed with the letter. In answer to this letter, defendant went to the office of plaintiff and talked the matter over with him.
>
> "The testimony of the witnesses, including that of the defendant, conclusively established the truth of the charges made in the affidavit of contest.
>
> "The testimony shows beyond a question that, at the time the contest was begun, no improvements of any kind were then on the premises, that defendant had been absent for a long period, and that he had never cultivated any part of the land.
>
> * * * * * *
>
> "Defendant's excuse for being away from the land is that he could not make a living on the same, owing to lack of water for irrigation purposes. He offered testimony to this effect, though it is shown that

others in the same community managed to get along under similar conditions and circumstances.

"Defendant returned to his claim about the first of April, 1908, and after failing to get the contest dismissed, commenced the first active work of improving the land, other than that heretofore referred to.

* * * * * *

"Defendant admits that in 1907, prior to his return to the land, he registered and voted at the town of Imperial, and he would not say that he did not vote at other times prior thereto.

* * * * * *

"He admits that he saw the Government circular relative to these Government projects, and if he did, he must have been then and there advised that he must meet all the requirements of the homestead law, and that he could not depend upon water being brought to the land by the Government and use that as an excuse for failure to meet the requirements.

"In the instructions of the Department as to the arid lands, it was distinctly stated that no modification of the homestead law in its application to said lands could be made, as the Secretary of the Interior had no authority to extend the time for the establishment of residence, or to change any of the conditions of the homestead law as to the maintenance of such residence and cultivation of the land. See 32 L. D., 633" (R. 40 and 41).

In his second opinion (R. 78 to 83), the one on rehearing, Judge Trippet held, as he was perforce required to hold, that, in contemplation of law, Bodkin had never initiated a contest. That holding, as he was careful to make plain, was rested upon the Court of Appeals ruling in 249 Fed. 562. *The fact in proof which Judge Trippet, and afterwards the Court of Appeals, deemed sufficient to sustain such holding, to wit, the fact that Bodkin executed his affidavit of contest on information*

and belief, although it appeared to have been executed on actual knowledge and was corroborated on personal knowledge, is set out at pages 64 and 65 of the record in No. 495 in this court. THE SECOND OF THE ERRORS SPECIFIED IN THE ASSIGNMENT ON THE APPEAL TO THE SUPREME COURT OF THE UNITED STATES IN NO. 495 CHALLENGED THAT HOLDING.

That the said fact and the said ruling thereon were deemed by Judge Trippet to be of vital import, is deducible from this observation by him, viz, "If there was no contest, the defendant never acquired any preference right, and that fact has an important bearing throughout this case" (R. 80).

Immediately after making the foregoing observation, Judge Trippet said, that "the court of appeals points out (p. 569) that EVEN THOUGH THERE WAS A CONTEST, THE DEFENDANT BODKIN COULD NOT HAVE OBTAINED ANY PREFERENCE RIGHT" (R. 80).

The Court of Appeals did so point out, for it said in 249 Fed. 562, 569, that:

> "We are of opinion that whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909" (37 L. D., 365).

THE THIRD OF THE ERRORS SPECIFIED IN THE ASSIGNMENT ON THE APPEAL TO THE SUPREME COURT OF THE UNITED STATES IN NO. 495 CHALLENGED THAT HOLDING.

As it had been held by the Court of Appeals theretofore (249 Fed. 562), (1st) that there had been no contest, and (2d) that even if there had been one the regulations of 1909 terminated the preference right, was not

Judge Trippet compelled by "the law of the case" doctrine to remark, *in the light of the record as printed in this court,* that Bodkin "had no rights to be considered" (R. 80).

The only other matter of fact or of law noticed by Judge Trippet was the construction placed by the Court of Appeals on the 5th section of the act of June 27, 1906, in 249 Fed. 562, 567. In noticing it, Judge Trippet, who might or might not have actually agreed with it, availed of the occasion to say: "In any event the Court of Appeals has settled the law of this case, and this court must follow the decisions upon that subject" (R. 81). Then proceeding to show the extent to which that construction of a statute was controlling in the case, Judge Trippet said:

> "It must be borne in mind that the Court of Appeals in this case has decided, that the plaintiff did not have to make improvements upon the land. If the Land Office meant by stating that the plaintiff did not act in good faith, in that, he did not make improvements and reclaim the land as required by law, then the opinion of the Court of Appeals is to the effect that he did not have to comply with the homestead law in this regard during the times of withdrawal" (R. 82).

THE FIRST AND SECOND OF THE ERRORS SPECIFIED IN THE ASSIGNMENT IN NO. 495 IN THIS COURT BROUGHT THAT CONSRUCTION OF A STATUTE OF CONGRESS UNDER REVIEW HERE.

The Court of Appeals opinion, delivered by District Judge Wolverton (R. 84 to 86), on the appeal from Judge Trippet's rulings, contains this all too true observation:

> "There is much testimony in the record that is concededly irrelevant and immaterial, much that is incompetent as well, but its admission by the trial court over objections and exceptions affords no ground in a cause in equity for reversal. The Court of Appeals gives consideration only to such as is competent and material to the issues joined" (R. 86).

Nowhere in Judge Wolverton's opinion is there the shadowiest of intimations that Judge Trippet had revised, modified or changed any findings made by the Land Department. Nor is there therein anything to indicate that Judge Wolverton gave any heed to the evidence in the contest proceeding in the Land Department, which was thrust into the record on the initiative of the alleged pauper, Edwards. *Said opinion by Judge Wolverton is, by logical and necessary inference, an unmistakable announcement that the case came before the Court of Appeals the second time upon a record containing enough of fact, even in the absence of copies of the patents that issued to Bodkin, and even in the absence of the evidence taken in the contest proceeding in the land department, to sustain every one of the previous rulings of the Court of Appeals in matters of law.*

One comment made by Judge Wolverton is deserving of special notice. He says (R. 85) that the Court of Appeals first decision held that the Land Department erred in cancelling Edwards' entry for abandonment "while in fact he was residing upon the land and holding it." *Under no possibly rational view of the case can that comment be accepted as indicating that Judge Wolverton had examined the evidence adduced in the contest proceeding in the Land Department, and had held that it was without any proof whatever to sustain the said depart-*

ment's findings and conclusions that "there has been an utter lack of good faith shown in his (Edwards') relations towards his entry" (R. 38), *"that defendant (Edwards) has never established a bona fide residence on the land covered by his entry" * * * "and defendant (Edwards) admits that his home and residence has at all times been at that point (in the town of Imperial, California), that he has been engaged in business there, from a date soon after making his entry up to the time that he had knowledge of the pending contest against his entry, and then came to the land"* (R. 41), *that "Indeed, his actual home was in another county, where he was qualified as a voter by swearing that he resided there. He states that he visited the land about every six months, staying only a few days at a time. He had no house to live in. In fact he had no house completed at date of hearing, more than six years after entry."* (R. 42 and 43).

THERE WAS INDEED CONCURRENCE BELOW, BUT IT WAS A CONCURRENCE THAT SAID DEPARTMENT'S FINDINGS COULD BE, AND WERE, DULY ACCEPTED AS FINDINGS MADE IN A CONTEST PROCEEDING, BUT IN A CONTEST PROCEEDING WHICH, AS THE COURTS BELOW HELD, WAS INVALID BECAUSE FORBIDDEN BY LAW.

THE CONCURRENCE BELOW WAS UPON THE SIGNIFICANCE AND EFFECT IN LAW OF THE DOCUMENTARY EVIDENCE, WHICH WAS PRESENTED UNDER AN AGREED STATEMENT OF FACTS (R. 20 *et seq.*), AND THE TESTIMONY OF EDWARDS AND McFEE FROM THE WITNESS STAND, WHICH BODKIN, WISELY, MADE NO ATTEMPT TO CONTRADICT. OF COURSE

THIS COURT IS WITHOUT MIRACULOUS POWERS. HENCE THE EXACT CHARACTER OF THE CONCURRENCE BELOW CANNOT BE ALTERED MERELY BECAUSE THIS COURT, MISTAKING THE CHARACTER OF THE CASE BELOW, BASED ITS AFFIRMANCE UPON THE MISCONCEPTION THAT "THE CASE AS PRESENTED HERE TURNS ESSENTIALLY ON QUESTIONS OF FACT."

As did Judge Trippet, in the District Court, Judge Wolverton in the Court of Appeals appears to have taken some pains to render it clear that it could not be fairly inferred that his individual views on the pertinent matters of law were necessarily the same as those expressed by the Court of Appeals, speaking through Circuit Judge Morrow, in 249 Fed. 562. For instance, Judge Wolverton said:

> "It is unnecessary to restate the reasoning of the court which induced the result." * * * "Those reasons are fully stated in the opinion of the court." * * * "It is a rule of law no longer to be controverted in the Federal Courts, THAT WHATEVER HAS BEEN DECIDED UPON ONE APPEAL CANNOT BE RE-EXAMINED IN A SUBSEQUENT APPEAL OF THE SAME SUIT OR ACTION" (R. 85, 265 Fed. 621. Upper case supplied).

No question of fact having been decided on the first appeal to the Court of Appeals, and there having been thereafter a virtual submission of the case in the District Court on documentary evidence and testimony which Bodkin never controverted, but only contended was not sufficient in law to warrant the relief prayed for by Ed-

wards, why is it not perfectly plain that what Bodkin was seeking to have the Court of Appeals do on the second appeal, WAS NOT TO REVIEW MATTERS OF FACT BUT TO REVIEW AND REFUSE TO FOLLOW FORMER RULINGS IN MATTERS OF LAW.

BODKIN'S THEN COUNSEL MUST HAVE REALIZED, WHEN THEIR CLIENT WAS IN THE DISTRICT COURT FOR THE SECOND TIME, AND AFTER EDWARDS' AMENDED ANSWER WAS FILED, THAT THEY WERE ASSUREDLY ON THE FIRST LEG OF A JOURNEY TO THE SUPREME COURT OF THE UNITED STATES FOR RELIEF FROM RULINGS IN MATTERS OF LAW, WHICH RULINGS CAUSED JUDGE TRIPPET TO REMARK, THAT "WE WILL, THEREFORE, PROCEED TO CONSIDER THE CASE WITHOUT REGARD TO THE RIGHTS OF BODKIN, FOR UNDER THE DECISION OF THE COURT OF APPEALS, HE HAD NO RIGHTS TO BE CONSIDERED."

May we not, in view of the foregoing demonstration of the soundness of our contention, very respectfully but earnestly insist that No. 495 never was in this court, nor in any court, a case of a character that "turns essentially on questions of fact," but that it was at all times a case that presented nothing beyond or different from questions of pure law, and, therefore, that it was in this court, substantially as Nos. 291 and 292 are here, upon proceedings practically the same in effect as the submission of a case on demurrer to the evidence?

IV.

GRIEVOUSLY WRONGED WOULD BE THE RESPONDENTS IN NOS. 291 AND 292 IF THIS COURT'S DECISION OF FEBRUARY 28, 1921, IN NO. 495 SHOULD BE HELD TO BE DETERMINATIVE OF THE ISSUES IN THEIR CASES.

If it be perfectly obvious from the language of a Federal, or any, court's decision, or if it be a truth apparent upon actual study of the language of such decision in the light of the record in the case, that the decision determined absolutely nothing in the case but questions of law, is it within the range of judicial possibility that this court (misconceiving what occurred in the court below), by mere assertion that the decision, determination and adjudication below turned upon questions of fact, can require the bench and bar to disregard the real character of the basis for the decision below and treat it as a decision which was rested upon an entirely different basis than that which the court below had assigned for it? This question is not asked in a spirit of disrespect. It is propounded in aid of elucidation of our contention that this court very evidently misconceived the true character of No. 495 when it referred to it as a case which "as presented here turns essentially on questions of fact."

In No. 495 Edwards did not rely upon a settlement existent upon April 18, 1910, nor upon an application to enter which was filed May 18, 1910. *But the two petitioners in Nos. 291 and 292 do rely exclusively upon settlements made on April 18, 1910, and upon applications filed on May 18, 1910.*

Neither of the petitioners in Nos. 291 and 292 is

claiming, as Edwards claimed in No. 495, under a homestead entry which he alleges was unlawfully canceled on contest proceedings. The men who claimed under the canceled homestead entries referred to in Nos. 291 and 292, never asserted a claim after the cancellations were ordered and entered. *But as their entries were in fact cancelled under circumstances similar to those under which the Edwards entry was canceled, then their entries are still intact and existent on the records of the land department, in contemplation of law, if, as was said in 249 Fed. 562, the 5th section of the act of June 27, 1906 (34 Stat. 519, 520), forbade contests on the ground of abandonment and left the Land Department without jurisdiction to entertain contests upon that ground and, consequently, powerless to order and effect a valid cancellation.*

Opposing counsel will probably find it somewhat embarrassing to contend in Nos. 291 and 292 that the decision of this court of February 28, 1921, in No. 495 rules the decisions in Nos. 291 and 292. The embarrassment they cannot escape is this:

That if this court's said decision of February 28, 1921, is an actual concurrence in the views of the Court of Appeals in No. 495 as to the meaning of the act of 1906, *supra*, then, necessarily, the homestead entries which Fleischer and Ocheltree, the respondents in Nos. 291 and 292, respectively, contested and had canceled, were never contested and were never canceled, in contemplation of law and therefore, also in contemplation of law, were intact on the records of the Land Department on April 18 and May 18, 1910, and have been ever since, from which would follow a situation which opposing counsel will doubtless discuss more fully in their argument at the bar than they have in the briefs they filed on April 16, 1921.

It was in nowise essential to relief for Edwards under his bill of complaint, for the Court of Appeals to have passed upon the validity of the Interior Department's regulations of June 6, 1905, 33 L. D., 607, and of January 19, 1909, 37 L. D., 365. Edwards was afforded full relief under that court's views that the said act of 1906 relieved homstead entries from contest and that, because Edwards continued in occupancy of the land until after it was restored to settlement and entry on April 18, 1910, and May 18, 1910, respectively, it was unlawful for the Land Department to have allowed Bodkin to make entry. *Remembering that proposition, there will be agreement with us that this court's affirmance of February 28, 1921, in No. 495, may well be said to have affirmed only those rulings in law below which were essential to determination of that case below in favor of Edwards, and leaves still open for decision by this court the question whether it should approve and confirm the views of the Supreme Court of the State of California in Nos. 291 and 292 as to the effect in law of the said regulations of 1905 and 1909, respectively, or ratify and sustain the opposite views of the Circuit Court of Appeals (249 Fed. 562) as to the effect in law of the same regulations.*

V.

IN THE PETITION FOR REHEARING IN NO. 495, AS WELL AS HEREIN, WE SHOW PLAINLY THAT THE AFFIRMANCE IN NO. 495 WAS DUE ENTIRELY TO NOTHING ELSE BUT THE EASILY PROVEN, IF NOT NOW OBVIOUS, MISCONCEPTION THAT SAID CASE HAD BEEN PRESENTED HERE ON QUESTIONS OF FACTS.

At the outset of this chapter of our brief, we refer to the allusion in this court's opinion of February 28, 1921, to the fact that "under the appellant's specification of what should be included" in the record of No. 495 in this court, a part of the evidence in the courts below was omitted.

If it be true that this court has repeatedly decided, that the decisions of the Land Department are conclusive everywhere as regards all questions of fact.

If it be true that it is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of said department upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country.

If it be true that the findings of fact of officers of the Land Department cannot be reversed or corrected by the courts in a collateral proceeding between private parties.

If it be true that in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final,

If the foregoing elementary and familiar principles of jurisprudence were undoubtedly in the minds of the courts below when they were considering the case which was No. 495 in this court,

May we not state it as an absolute fact, and for verification of such statement confidently refer to the language of the decisions below and to all the logical implications thereof, that none of the courts below revised, modified or changed a single finding of fact made by the Land Department in the Bodkin-Edwards contest?

May we not also state it as an absolute fact, and base such statement upon the same language and same implications of the same decisions, that *no court below made*

any finding of fact which is without its evidence in the record of No. 495 in this court?

May we not also state it as an absolute fact, and rest such statement upon said decisions and upon the contents of said record, that *there is set out in the record of No. 495 in this court all the evidence of every fact upon which every ruling below in a matter of law was based?*

If we are entitled to answers in the affirmative from this court to the foregoing questions, then, as we submit, *the record in No. 495 in this court was complete for all the purposes of an adjudication by this court under all the errors alleged in the assignment in No. 495.*

This court's opinions are reported and widely read. The reports thereof carry the names of counsel. Whatever lack of intelligence or diligence on the part of Bodkin's counsel in No. 495 was indicated by his withholding of answer to a motion to dismiss or affirm which motion, on its face, was utterly meritless, there can be no just inference that he painstakingly omitted from the record in No. 495 in this court matter which he deemed hurtful to his client's case and helpful to the case of his adversary.

Owing to the manner of the summarization in this court's opinion of February 28, 1921, of what it deemed to be the record shown facts in No. 495, it might be inferred that "Bodkin instituted a contest against the entry" *after, instead of long before,* Edwards submitted final proof. It is also remarked in such summarization that Edwards "submitted final proofs in due course."

The record shown facts are that the "final proofs" were submitted on April 23, 1909, *six years and four months after the making of the entry, about a year after there was service on Edwards of Bodkin's contest, about four months after the Register and Receiver rendered their decision that Edwards' entry should be cancelled*

on Bodkin's contest, and when the contest proceeding was on appeal to the General Land Office (R. 44 and 37 to 39).

It is remarked in the said opinion of this court that "the land officers then permitted Bodkin to make a homestead entry of the land, afterwards allowed him to relinquish that entry and make others of the same tract under soldier's additional rights of which he was the assignee," et cet. *When the court made the above remark it should have occurred to it, and we do not say that it did not, that when the Land Department had "permitted" and "allowed" as above stated, it was, presumptively, administering the law as it in good faith understood it and honestly believed it should be applied as between Bodkin and Edwards. It must be taken for granted that this court perceived that the litigation revolved about the question whether what was thus "permitted" and "allowed" was lawfully "permitted" and "allowed." But this court did not expressly pass upon the lawfulness of what was "permitted" and "allowed,"* ALTHOUGH THE ASSIGNMENT OF ERRORS ON THE APPEAL SOUGHT TO HAVE IT DO SO AND SOUGHT NOTHING MORE THAN AN EXPRESSION FROM IT ON MATTERS OF LAW EXCLUSIVELY.

The record in No. 495 shows that Bodkin's application to make homestead entry in the exercise of his preference right was filed May 18, 1910; that it was suspended for a reason not material here and that it was "permitted," or approved and an entry made thereunder, on June 1, 1912 (R. 55); that nearly two years thereafter, on March 6, 1914, Bodkin relinquished the entry *without abandoning the land*, for on the same date he filed or located the soldiers' additional rights (R. 59 et seq); that on December 23, 1914, and for the reasons set out in its decision of that date, the General Land Office "allowed," or au-

thorized final entry under, the soldiers' additional rights (R. 59 to 64); that, as set out in said decision and more fully shown in Wells v. Bodkin, 47 L. D., 288, what the General Land Office thus "allowed" was, in fact, something Bodkin felt he was required to do, and which he had the unquestionable right to do (as the Land Department duly adjudged he had), if he desired to exercise and enjoy the rights he and his wife became entitled to as the heirs of his unmarried daughter, Florence Bodkin, who died after acquiring a right under the homestead laws which passed to and vested in her heirs. *These facts,* NOT QUESTIONED BY EDWARDS OR ANYONE, *all appear in the record in No. 495. The views of the lower courts thereon as to their effect in law controlled the decisions of those courts.* THOSE VIEWS ARE DULY CHALLENGED IN THE ASSIGNMENT OF ERRORS IN NO. 495. SURELY THIS COURT, IF IT HAD NOT MISCONCEIVED THE TRUE CHARACTER OF NO. 495, WOULD NOT HAVE, COULD NOT HAVE, SAID THAT "THE CASE AS PRESENTED HERE TURNS ESSENTIALLY ON QUESTIONS OF FACT."

The so-called scrip selection by Bodkin seems to us to have unduly affected the minds of the courts below, possibly excited therein an unconscious leaning toward Edwards in the litigation. *But what if Bodkin had used the so-called scrip at the outset, and not until after he had resided upon the land for about two years under his homestead entry?* In other words, what would have been the effect in law of use of the so-called scrip on May 18, 1910, when Bodkin filed his homestead application to enter in exercise of his preference right as a successful contestant? Bodkin rested under no legal obligation to exercise that preference right by tendering a homestead

application. On May 18, 1910, the land was restored to entry under the general land laws, and therefore Bodkin could then have used the scrip, if he had so desired, *regardless of Edwards occupancy of the land at that time. If that proposition is not sound then there are other decisions and regulations of the Land Department that are obnoxious to law and the public interests, notably the decision of November 10, 1919, in Goodwin v. Goodin, 47 L. D., 298, wherein it was said:*

> "In the opinion of this Department none of the charges made in the protest justifies the rejection of Goodin's application to enter. Neither the settlement of Goodwin, which was made after the cancellation of the entry contested by Goodin, *nor her occupation of the land at the date of his application to enter,* defeated his preference right. (Hodges et al. v. Colcord, 24 L. D., 221; Thorbjornson v. Hindman, 38 L. D., 335; Arnold v. Burger, 45 L. D., 453.)
>
> "It is not contended that the soldiers' additional right here involved was not valid, or that it was not formally assigned to him, or that it would for any reason not support his entry, and the mere fact that he is not seeking the land for his own continued use and benefit does not forbid the allowance of his application and will not invalidate his entry. *He was not required to show that he was not seeking to make this entry for speculative purposes, as is the case with an applicant under the general provisions of the homestead laws. He gained a personal right and benefit by securing the cancellation of the former entry and it can not be said that he is guilty of fraud if he elects to utilize that right and benefit by entering the land and immediately transferring it to some other person.*"
>
> * * * * * *
>
> "In this case the title to the soldiers' right is held by Goodin himself. The entry will be his entry

> and in his name, and the patent will issue to and vest the title to the lands applied for in him." (Italics supplied.)

Another observation in this court's said opinion should be discussed here. It is that "Bodkin answered and the issues were tried." Did this court misconceive the mode of trial? Bodkin's answer is set out at pages 11 to 29 of the record. Its denials cast upon Edwards' proof of every allegation of fact in his bill of complaint which the Court of Appeals in 249 Fed. 562 had rendered material by its rulings on several matters of law. The proof Edwards offered was contained *in the agreed statement of facts* (R. page 30 to paragraph 28 on page 64), in the entire evidence taken in the contest proceeding in the Land Department, which was omitted from the record in this court (with the implied if not express, consent of Edwards and for the valid reasons set out in detail elsewhere herein), a portion of Bodkin's testimony in the contest proceeding (R. 64, 65), and the testimony by Edwards and one McFee which was taken in the District Court (R. 65 to 71). NO ATTEMPT WHATSOEVER WAS MADE BY BODKIN TO REBUT SUCH PROOF IN ANY RESPECT OR TO ANY EXTENT. Bodkin put into the record copies of the patents that issued to him and copies of pleadings and of notes of proceedings in possessory actions in the State Court which, for valid reasons stated elsewhere herein, were not carried into the record for this court.

We respectfully submit that from the foregoing it is manifest that no issues of fact were actually tried below; that there was no controversy below between the parties as to facts; *that, after the coming in of Edwards' colorable amended bill, Bodkin realized that Edwards would attempt to make no proof (and he did not) of any fact*

other than what might be essential as a basis for his becoming the beneficiary of those rulings in matters of law which the Court of Appeals made in 249 Fed. 562, and which Bodkin believed to be utterly unsound. IN SUCH CIRCUMSTANCES, WITH BODKIN CONTROVERTING NOTHING HIS ADVERSARY CHOSE TO PUT IN THE RECORD, BUT PLAINLY AND OF NECESSITY RELYING UPON THIS COURT TO REVIEW THE RULINGS IN 249 *Fed.* 562, WE VERY RESPECTFULLY SUBMIT THAT NO. 495 WAS IN THIS COURT ON QUESTIONS OF LAW EXCLUSIVELY.

Lest we fail of performance of our full duty to the court and to our clients, we ask the court's indulgence to comment on the following statement in its opinion of February 28, 1921, in No. 495, to wit:

> "The court found that the material allegations of the bill were true; that in proceedings before the Land Department matters presented by Edwards which should have been considered were not considered, and that in consequence the title was passed to Bodkin when it should have gone to Edwards."

Of course this court did not mean that the court below had found that Edwards had presented to the Land Department the matter of the alleged immunity of homestead entries from contest for abandonment, because of the 5th section of the act of June 27, 1906, 34 Stat. 519, 520, and that the department had neglected or refused to consider it. *But as a matter of fact the said statute is the only thing any court below found had not been considered by the Land Department.* No court below found that said department had not done what the record in this court in No. 495 plainly shows that it did, to wit, consider Ed-

wards' defense against Bodkin's contest, consider Edwards' application for second homestead entry, consider Edwards' application to contest Bodkin's entry, consider Edwards' motion for acceptance of his final proof, and consider the merits of Edwards' protest against the so-called scrip selection. (R. 37 to 43; 50, 53, 57, 58, 59, 71 and 73). No other matters than these were ever presented by Edwards to the Land Department for its consideration *and Edwards did not allege in his complaint that he had submitted other matters to the Land Department and that they were not considered by said department. What the courts below did clearly hold was that the Land Department had, after consideration, rejected Edwards' final proof when, if said department had not "misunderstood" or "overlooked" the said act of 1906, it would have accepted and approved it.*

This court was not at all specific or explicit as to what it had apprehended, upon review by it of the record in No. 495, were the matters of fact or of law which the courts below found "should have been considered," but "were not considered" by the Land Department. However, it must be assumed that this court, although not stating or describing those matters of fact or of law in its opinion of February 28, 1921, perceived their real existence and affirmed the decree below solely because such matters had not been considered by the Land Department. We beg leave to remark that we deem it very unfortunate that the language of this court's decision of February 28, 1921, leaves for conjecture what those matters were. *We do not know what they are. Surely they are not pointed out in this court's decision nor in any decision below. Therefore, we are left in the dark by the judiciary as to the precise default on the part of the Land Department which only the Supreme Court of the*

United States has made the basis for a decree of virtual transfer to Edwards of the property of Bodkin.

In concluding this chapter of our brief we very respectfully submit that No. 495 was not a case in this court in which there was express or implied agreement between the litigants as to the materiality of the allegations of the bill of complaint, a voluntary recognition by the plaintiff, under an answer to the bill and by denial of its averments, that a cause of action was stated, and that the granting of the relief prayed was dependent solely upon proof establishing the allegations of the bill. *Bodkin's answer to Edwards' complaint was enforced by the Court of Appeals' rulings in matters of law, 249 Fed. 562. From those rulings, and from them alone, the allegations of Edwards' bill became endowed with the merit of materiality. Bodkin not having raised any question below or here that called for any ruling other than one as to whether all the uncontroverted documentary evidence, and the testimony from witnesses, established facts which, in law, were sufficient to warrant the granting of the prayers of Edwards' bill, we submit that No. 495 was not of the class of cases which, although presenting Federal questions, will not, under the settled rule of this court which is referred to in its said opinion of February 28, 1921, be reviewed here on alleged errors having to do solely with the admissibility of evidence to establish facts.* IN SHORT, NO. 495 WAS NOT HERE FOR DECISION AS TO WHETHER FACTS WERE DULY IN PROOF, BUT WAS HERE FOR DECISION AS TO WHETHER SUCH FACTS AS THE COURTS BELOW STATED THEY FOUND, WERE SUFFICIENT IN LAW TO SUSTAIN THEIR RULINGS.

VI.

McLAREN AND CULPEPPER COULD HAVE LEARNED AT THE LAND OFFICE IN LOS ANGELES, BEFORE THEY MADE THEIR SETTLEMENTS, OF THE AWARDS OF PREFERENCE RIGHTS OF ENTRY TO FLEISCHER AND OCHELTREE.

That the land in suit was *surveyed* at all times mentioned in the bill of complaint, is a permissible deduction, if not an admitted fact, in this litigation. Another fact that may be deemed to be satisfactorily in proof is that Fleischer knew the description, in terms of the official surveys, of the lands in suit, on April 18, 1920, when he made settlement thereon. Obvious it is that he knew such description on May 18, 1910, when he filed his application for entry.

Persons who connect themselves with the surveyed public lands with view to asserting claims thereto, are chargeable with notice of what the official records in the appropriate local Land Office show, both as to the status of the lands and existing claims or rights with respect thereto. *McLaren could not have known on April 18, 1910, that the land in suit was surveyed* PUBLIC LAND, *unless he knew what the records in the appropriate local Land Office showed with respect to it.* Therefore, if McLaren did not know on April 18, 1910, that the land he settled upon on that date was subject to the preference right of entry which had been earned by and was *vested* in Fleischer, his ignorance in that regard cannot be helpful to him here, for, as is patent, Roe's ignorance of Doe's rights does not either destroy or diminish those rights or make them subject to, subordinate to and

inferior to an act done by Roe in ignorance of a fact of which he has knowledge because charged with knowledge by law.

The foregoing observations have been made only because of the possibility that this court might be asked, in the argument of opposing counsel, to decide against Fleischer and Ocheltree and for McLaren and Culpepper, owing to the fact that the order of restoration of the lands to the public domain did not state that some of the lands might be entered in the exercise of contestants' preference rights of entry. *While there is nothing in the pleadings to the effect that McLaren and Culpepper were misled by the notice of the order of restoration into the belief that the lands were free from all claims, and that the first settlers would acquire the first rights, and that, therefore, they made their settlements without notice of the said preference rights, it is not entirely impertinent to remark here that whether the order of restoration did or did not notify the public of the existence of such preference rights, no omission of any duty by any officer of the Land Department could have deprived Fleischer or Ocheltree of those rights.*

VII.

THE ULTIMATE AND ONLY REAL QUESTION IN NOS. 291 AND 292 WAS THE SAME ULTIMATE AND ONLY REAL QUESTION IN NO. 495, TO WIT, DID A SETTLEMENT UPON THE LAND WHICH WAS EXISTENT ON APRIL 18, 1910, DEFEAT THE PRE-EXISTENT PREFERENCE RIGHT WHICH WAS IMPOSSIBLE OF EXERCISE UNTIL MAY 18, 1910.

Now having done with the rulings of the Court of Appeals, speaking through Circuit Judge Morrow, 249 Fed. 562, so far as they were *controlling* below in No. 495, we will deal with those other rulings in that decision which it was wholly unnecessary for that court to make in view of its conclusion that Edwards entry never had been lawfully contested and never had been lawfully cancelled.

Is it true, as said court declared it was, that the department's regulations of June 6, 1905 (33 L. D., 607), were invalid because, in effect, and attempt by the Land Department to legislate, to amend the act of May 14, 1880, 21 Stat. 141? The question is a very serious one, for if the said court's views are sound many titles under many patents issued by the Land Department are in jeopardy.

When the Land Department withdraws lands it does so, presumably, in promotion of the public interests and in the exercise of a power Congress has granted it. *An order of withdrawal is the government's method of asserting a government claim to public land for the general good. It usually takes the form of a reservation of public lands from disposal pending legislation, or the determination of some question as to the character of the land or as to its value for governmental uses.*

The lands in suit were withdrawn under the Reclamation Act of June 17, 1902, 22 Stat. 388. The petitioner's bill of complaint does not aver the existence of any withdrawal prior to the "first form" withdrawal which, as alleged in the complaint, was made on September 8, 1903. A first form withdrawal—

> "embraces lands that may possibly be needed in the construction and maintenance of irrigation works

> and the other commonly known as 'withdrawals under the second form,' which embraces lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works." Instructions of June 6, 1905, 33 L. D., 607.

Thus it appears, that when a first form withdrawal is made, the government has concluded that it might find the lands described therein essential to *the construction* of a governmentally originated and conducted enterprise for the irrigation of public lands. *Therefore the lands described in such a withdrawal are lands which, presumably, the government desires to retain permanently in the ownership of the United States, in order that the government may use them, occupy them, and build and construct thereon works for the irrigation of other and nearby or contiguous lands. In short, such a withdrawal is made to prevent the initiation of claims to the land that might ripen into titles thereto, with resultant necessity on the part of the United States to re-acquire title through purchase or condemnation proceedings.*

Is it not a logical corollary of the foregoing that the government should desire, that the public interests should require, the extinguishment of any mala fide claims, which had been initiated before the withdrawal, or claims which were not being maintained in accordance with law?

> "Withdrawals made under either of these forms do not defeat or adversely affect any valid entry, location, or selection which seregated and withheld the lands embraced therein from other forms of appropriation at the time of such withdrawal; and all entries, selections, or locations of that character should be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which

they would have proceeded had such withdrawal not been made, except as to lands needed for construction purposes."

* * * * * *

"Any entry embracing lands included within any withdrawal, made upon either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the Land Office fees occasioned by his contest will be awarded a preferred right of making entry under the reclamation act, provided the lands involved are not embraced within a withdrawal of the first form.

* * * * * *

"When any entry for lands embraced within a withdrawal under the first form is canceled by reason of contest, or for any other reason, such lands become subject immediately to such withdrawal and can not, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry. (Italics supplied.)

"In the event any lands embraced in any entry under which final proof has not been offered, or in any unapproved or uncertified selection, are needed in the construction and maintenance of any irrigation work (other than for right of way for ditches or canals reserved under act of August 30, 1890) under the reclamation act, the Government may cancel such entry or selection and appropriate the lands embraced therein to such use, after paying the value of the improvements thereon and the enhanced value of such lands caused by such improvements." Instructions of June 6, 1905, 33 L. D., 607, 608, and 609.

The government employs men, known as special agents, to assist in ridding the public lands of spurious claims thereto. But if the government depended exclusively upon them for that purpose, much more land would be obtained fraudulently than is obtained. We do not mean that the special agents are not efficient and faithful public servants, we mean only that there are not enough of them for a really protective patrol of the public domain. Congress has aided the government otherwise than by appropriations for such employes, in freeing lands from mala fide claims. It has provided an inducement and a reward to citizens for bringing to the notice of the government the existence of mala fide land claims.

The right of an individual to contest a homestead entry for failure on the part of the claimant thereunder to maintain it in accordance with law is found in the homestead statutes. (See section 2297, Revised Statutes.) However, it was not until enactment of the statute of May 14, 1880 (21 Stat. 140), that a reward for contesting the entry of a defaulting claimant was offered by the United States. Such reward is described in said Act of 1880, as follows:

> "That in all cases where any person has contested, paid the Land Office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the Land Office * * * of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands." (21 Stat. 140.)

As to the policy of the law of contest the following is quoted from Brown v. Brown and Moses v. Brown, (2 L. D., 259, 260):

> "You will also please notify the local officers that Congress has in various ways invited and encouraged persons to inform against those who are endeavoring to acquire title to the public land fraudulently or illegally, as the only adequate means of protecting the United States; and that it is their duty to further this policy by examining carefully any application to contest a claim, pointing out its defects to the applicant, and allowing him to amend it at once."

The preference right of entry referred to in the said act was defined in Strader v. Goodhue, 31 L. D., 137, 138.

The petitioners here challenge the lawfulness of administration under said act of 1880 with view to ridding lands within first form withdrawals of mala fide claims thereto. They will contend, necessarily, that the functions of the Secretary of the Interior, as "the supervising agent of the government to do justice to all claimants *and preserve the rights of the people* of the United States" (Knight v. U. S. Land Association, 142 U. S. 161, 178. Italics supplied), do not require or permit him to promulgate a regulation of promise to a successful contestant, that, if the United States decides it does not want the tract of public land which was embraced in the entry the contestant had canceled, such contestant will be notified accordingly and will be allowed to make entry of such land at any time within thirty days after it has been restored to the public domain.

Said regulation is valid or invalid accordingly as this court views the range of the lawful discretion of the Secretary of the Interior in administering under said act of 1880, which is manifestly legislation in promotion of the public interests, in that its object is aid to the government in safeguarding the public domain against mala fide en-

tries and fraudulent appropriations? That being its object, should it not be both administered and construed liberally in effectuation of its salutary purpose? Administration under it has ever been exclusively within the province of the Land Department which has administered thereunder liberally. Is it essential to the public interests, or demanded by any law, that its provisions be so construed by the judiciary as to prevent its employment by the Land Department in exterminating a pest, viz., the speculative homesteader, from lands covered by first form reclamation withdrawals?

It is a logical inference that a contestant would not institute his contest and defray the heavy expense incident to its prosecution (the act of May 14, 1880, supra, and the decisions and rules of the Land Department thereunder requiring contestants to meet all the expenses of the contests), unless induced to do so by the offer of that uncertain reward which was held out by the regulations of June 6, 1905, to wit, a preference of entry only in event the withdrawal was revoked. Certainly contestants accepted that offer in good faith. They relied, they thought, upon the United States, speaking through the Secretary of the Interior, to grant, and not withhold, that uncertain and contingent reward, if earned. In view of these circumstances was there not something of a contractual relation between the contestants and the United States after the former began their contests? *If that contractual relation was not forbade by law, it is certain that this court should not render a decision with respect to it which would cause the United States to assume the role of a repudiator.*

This contractual aspect of the preference right was referred to in Wells v. Bodkin, 42 L. D., 340, in these words:

"His contest carries with it, therefore, an incipient and inchoate statutory right of entry and is in legal effect subsisting as between him and the United States, as the basis for such right of entry, until said right is exercised, waived or lost by some act of his, or is foreclosed by some interest of the Government or by limitation of the law. Neither the contestee nor any other person can, *by settlement or otherwise*, acquire any interest in the lands after initiation of the contest and prior to termination of the contestant's right of entry based by the statute thereon which is superior to such right in the contestant. Thorbjornson v. Hindman (38 L. D., 335)."

We shall say more concerning the said regulations of 1905, in connection with the ruling by the Court of Appeals, speaking through Circuit Judge Morrow, 249 Fed. 562, 569, "that whatever preferential right defendant had secured by his contest was terminated by the regulations of January 19, 1909," 37 L. D., 365.

In No. 291, as in No. 292, it is alleged that the first form withdrawal was made September 8, 1903. That was AFTER the original homesteader, Rider, in No. 291, and the original homesteader, Arnold, in No. 292, had made their respective entries. The contest against Rider was *initiated* on February 18, 1908. The contest against Arnold was *initiated* on January 30, 1908. The Rider entry was canceled, as a result of the contest, on January 28, 1909. The Arnold entry was canceled, as a result of the contest, on September 30, 1908. *All these dates are prior to January 19, 1909, except the date of cancellation of Rider's entry, which was nine days thereafter, or January 28, 1909. We call attention to these facts because, if the views of the Court of Appeals in 249 Fed. 562 are sound, Fleischer must lose in this court because*

the entry he contested was not canceled until after the regulations of January 19, 1919.

But obviously those views are as unsound so far as Nos. 291 and 292 are concerned, as they are so far as No. 495 are concerned, FOR IN ALL THREE CASES THE CONTESTS WERE NOT ALLOWED PRIOR TO THE WITHDRAWAL BUT THEREAFTER, AND THE REGULATIONS OF 1909 EXPRESSLY APPLY ONLY "WHERE A CONTEST HAS BEEN ALLOWED PRIOR TO SUCH WITHDRAWAL." See said 1909 regulations at page 365 of 37 L. D. THEREFORE SAID REGULATIONS HAVE NO APPLICATION IN NOS. 291 and 292.

While the 1909 regulations forbade the allowance *thereafter* of contests against entries of lands in first form withdrawals, its provisions as to the abatement of then pending contests were expressly limited to contests "allowed prior to such withdrawal." Why such regulations? Just a little thought will disclose the point of view of the officers who drafted those regulations, only to have them recalled after more scientific consideration. *A "first form" withdrawal is an adverse claim by the United States. The originators of the 1909 regulations thought more of that adverse claim by the United States than they did of the morality of just treatment of citizens whose contests, under the regulations of 1905, had been initiated and were in progress before the making of the first form withdrawal. They rather unwisely, if not arbitrarily, decreed that they would not permit a citizen who was perfectly willing to do so, to cancel a mala fide entry, with the reward for so doing dependent entirely upon the willingness of the government to abandon its adverse claim under the first form withdrawal, upon perceiving that the lands would not be needed for construction purposes and, therefore, might very properly be restored to*

the public domain for entry under the public land laws generally.

While not truly pertinent here, but certainly clearly indicative of the Land Department's realization that the regulations of 1909 were unwise, to the extent that they forbade future contests, the Instructions of August 24, 1912, 41 L. D., 171, and the Instructions of September 4, 1912, 41 L. D., 241, are cited for reference by the court. *Those instructions are now, and at all times since they were issued have been, in force and effect.*

For possible reference by the court for information as to the views of the Land Department on the basis of its claimed right to provide for contests against entries of land in a first form, or any form, withdrawal under the reclamation act, and to award preference rights to successful contestants, as well as to effectuate and safeguard those rights, see Beach v. Hanson, 40 L. D., 607; Edwards v. Bodkin, 42 L. D., 172; John T. Slaton, 43 L. D., 212; and Wells v. Fisher, 47 L. D., 288.

There is another contention the respondents will make which we should notice, viz, that the thirty day period for exercise of the preference right begins from date of cancellation of the entry, and that the preference right is forever lost, if the land continues in a first form withdrawal for more than thirty days thereafter. On that matter the Land Department, in John T. Slaton, supra, expressed these views:

> "The act of May 14, 1880 (21 Stat., 140), under which he gained such preference right, contemplates that notice of said right shall issue at a time when the land is subject to entry since time begins to run against the contestant from the date of such notice. Bassett v. Sunderlin (41 L. D., 437); Edwards v. Bodkin (42 L. D., 172)."

Have the foregoing views a basis in wise and lawful administration? The act of May 14, 1880, supra, does not command that the notice of the earned preference right shall be given forthwith upon cancellation of the entry. It says nothing as to the time of the giving of the notice, but does say that the successful contestant "shall be *allowed* thirty days from date of such notice to enter said lands." (Italics supplied.) What mockery and unfairness, what treachery, would inhere in any regulations of the Land Department, or in any provision of law, that required a person to be notified that he would be *"allowed"* to do what he could not do and what the law forbade any Land Department official to allow him to do.

If there is nothing express or implied in the act of 1880 that prohibits postponement of issue of the notice, or the postponement of the time of exercise of the preference right, until after it is possible for the government to permit actual enjoyment of such right, may this court condemn as unauthorized and unlawful a regulation of the Land Department that does nothing more than insure decent and fair treatment of a citizen who has, at his own expense, purged the Land Department records of a mala fide filing or entry?

In other words, is it possible that the judiciary may so far control the power of the Land Department in purely administrative matters as to say to it, that it shall not by its regulations fix any other time for the issuing of notice to a successful contestant than the date of cancellation of the entry he contested? What is said in United States v. MacDaniel, 7 Peters, 1-14, is illuminating in connection with the criticism by the Court of Appeals of the rule anent postponed preference rights. In said cited case these observations were made:

"A practical knowledge of the action of any one of the great departments of the Government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the Government."

VIII.

THE DEPARTMENT OF THE INTERIOR IS IN FACT A PUBLIC LAND "COURT", AND AS SUCH HAS AN INHERENT POWER, AND IT IS ITS DUTY, TO PRESCRIBE JUST SUCH REGULATIONS AS THE PETITIONERS ARE ATTACKING IN THIS COURT.

The Land Department is a species of court, a quasi-judicial tribunal. Its jurisdiction is only less extensive, territorially, than that of this court. The property and wealth within its jurisdiction and the number of litigants that come before it are larger and more numerous, respectively, than the property and wealth and the litigants that come within the scope of the powers of many courts. In United States v. Schurz, 102 U. S., 167, it was said:

"The Constitution of the United States declares that Congress shall have power to dispose of and

make all needful rules and regulations respecting the territory and other property belonging to the United States, and under this provision the sale of the public lands has been placed by statute under the control of the Secretary of the Interior.

"To aid him in the performance of this duty, a bureau has been created at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress has confided the execution of the laws which regulate the surveying, the selling and the general care of these lands."

In Low et al. v. Katalla Company, 40 Land Decisions, 539, it was said:

"The Interior Department is specifically authorized and empowered to enforce and execute the public land laws of the United States. Sections 441, 453, 2478, revised statutes. The Land Department is a quasi-judicial tribunal and has exclusive jurisdiction over the disposition of lands of the public domain in the absence of specific legislation to the contrary. Bishop of Nesqually v. Gibbon (158 U. S. 155); Knight v. United States Land Association (142 U. S. 616); McDaid v. Oklahoma (150 U. S., 209)."

In a very large measure the Land Department is independent of the judiciary, for instance:

"The decisions of the proper officers of the land department on questions of fact in a contest is conclusive on the courts and, in the absence of fraud in preventing a party from presenting his case, the decision is not subject to review by the courts by a charge of perjury against the witnesses." (Syllabus of opinion in Estes v. Timmons, 199 U. S. 391.

This court must concede, of course, the *inherent* power of so important an agency of government as the Land De-

partment to make rules and regulations. (Cosmos Exploration Company v. Gray Eagle Oil Company, 190 U. S. 301; Lytle v. Arkansas, 9 How. 314.) Not so to concede would be but to question the *inherent* power of the courts to establish rules of practice, as to all practical intents and purposes the Land Department, although a part of the executive branch of the government and controlled by executive and political officers, is nevertheless a court for the trial of public land cases, as under existing laws public land controversies are not possibly triable elsewhere.

CONCLUSION.

This court's decision of February 28, 1921, in No. 495 does not rule its decisions in Nos. 291 and 292. Our reason for this statement is that, in No. 495 the affirmance was, necessarily, as we have fully demonstrated hereinbefore, an approval of a decree below that was granted solely upon the alleged ground, upon what we deem to be the clearly untenable legal proposition, that the 5th section of the act of June 27, 1906, supra, relieved entries of lands within reclamation withdrawals from contests upon the ground of abandonment. *With that statute this court will not need to deal in reaching its conclusions in 291 and 292, unless, of course, it should hold that by reason thereof the Rider entry, which Fleischer (No. 291) contested, and the Arnold entry, which Ocheltree (No. 292) contested, were never lawfully canceled.*

Our final word is this: We have labored to our utmost, we have given all and the best we have, we trust that our contentions will be accepted in the spirit in which they have been made, in that spirit of earnestness and devotion in service to this court which is that of a citizen more interested in the cause of justice under the law than in himself, and far more deeply concerned about his duty to this

court than about success in a case in this court. It is submitted that the concurring opinions below in Nos. 291 and 292 are correct and, therefore, that the judgments based thereon should be sustained and affirmed.

Respectfully,

PATRICK H. LOUGHRAN,
Mills Building, Washington, D. C.,
Attorney for the Respondents in Nos. 291 and 292.

Due service of the within and receipt of two copies thereof, are hereby admitted this ..... day of April, 1921.

....,
Attorney for the Petitioners in Nos. 291 and 292.

McLAREN, ADMINISTRATOR OF McLAREN, *v.* FLEISCHER.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 291. Argued April 26, 27, 1921.—Decided June 1, 1921.

The Act of May 14, 1880, c. 89, 21 Stat. 140, provides that "where any person has contested, paid the land-office fees, and procured the cancellation of any preëmption, homestead, or timber-culture entry, he shall be notified by the register of the land-office of the district in which such land is situated of such cancellation, and

shall be allowed thirty days from date of such notice to enter said lands." *Held*, adopting the practical construction of the Land Department, that where an existing first-form withdrawal under the Reclamation Act prevented the land from becoming open to entry for more than thirty days after the notice of cancelation issued, a successful contestant of a homestead entry had thirty days after the tract was restored to public entry within which to exercise his preferred right. P. 480.

181 California, 607, affirmed.

THIS was a suit brought by McLaren to establish his equitable title to land patented to Fleischer, and to require Fleischer to convey. The state court of first instance dismissed the complaint, and the certiorari brings up a judgment of the state Supreme Court affirming that judgment. The facts are stated in the opinion.

Mr. Samuel Herrick, with whom *Mr. Henry M. Willis* was on the brief, for petitioner.

Mr. Patrick H. Loughran for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This case presents a controvery arising out of conflicting applications to enter a quarter section of land under the homestead law. While the land was public and unappropriated one Rider made a homestead entry of it, and later it was included, with other lands, in a first-form reclamation withdrawal.[1] The withdrawal did not extinguish Rider's entry, but while in force prevented the initiation of other claims. It was largely provisional and whenever in the judgment of the Secretary of the Interior any of the lands were not required for the purpose for which the withdrawal was made they were to be restored to public entry. While the withdrawal

[1] The withdrawal was made under the provision embodied in the first six lines of § 3 of the Act of June 17, 1902, c. 1093, 32 Stat. 388.

was in force one Fleischer instituted a contest against Rider's entry, at his own cost collected and presented evidence establishing its invalidity and procured its cancelation. Rider acquiesced in that decision and is not concerned in the present controversy. Fleischer had no claim to the land prior to the contest and in instituting and carrying it through acted as a common informer, which was admissible under the public land laws. To encourage the elimination of unlawful entries by such contests Congress had declared in the Act of May 14, 1880, c. 89, 21 Stat. 140:

"In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any preëmption, homestead, or timber-culture entry, he shall be notified by the register of the land-office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands."

When Rider's entry was canceled the register sent to Fleischer a written notice informing him thereof and stating that he would be allowed thirty days after the tract was restored to public entry within which to enter it in the exercise of his preferred right as a successful contestant. The notice was dated February 11, 1909. Afterwards the Secretary of the Interior issued an order whereby the lands included in the withdrawal were restored to settlement on April 18, 1910, and to public entry on May 18 following. On the earlier date one McLaren made homestead settlement on this tract and on the later date both Fleischer and McLaren applied at the local land office to make homestead entry thereof,—Fleischer in the exercise of his preferred right and McLaren in virtue of his settlement. Fleischer's application was allowed and McLaren's rejected, the local officers being of opinion that Fleischer had the prior and better right. McLaren appealed and the action of the local

officers was sustained by the Commissioner of the General Land Office and by the Secretary of the Interior. In due course Fleischer received a patent for the land and McLaren then brought this suit to have Fleischer declared a trustee for him of the title and to compel a conveyance in execution of the trust. During the pendency of the suit McLaren died and it was revived in the name of his personal representative. Fleischer prevailed in the court of first instance and again in the Supreme Court of the State. 181 California, 607. A writ of certiorari brings the case here. 253 U. S. 479.

The sole question for decision is whether the officers of the land department erred in matter of law in holding that under the Act of May 14, 1880, Fleischer was entitled to thirty days after the land was restored to entry within which to exercise his preferred right of entry. The words of the act are, "shall be allowed thirty days from date of such notice to enter said lands." Generally, when an existing entry is canceled the land becomes at once open to entry and the act is easily applied. But where, as here, an existing withdrawal prevents the land from becoming open to entry for more than thirty days after the notice of cancelation issues, the application to be made of the act is not so obvious, and it becomes necessary to inquire what is intended. Does the act mean that the preferred right to enter the land is lost if not exercised within thirty days after the notice issues, even though the land is not open to entry during that period? Or does it mean that the contestant shall have thirty days during which the land is open to entry within which to exercise his preferred right, and therefore that if the land is not open to entry at the date of the notice the time during which that situation continues shall be eliminated in computing the thirty-day period? In the practical administration of the act the officers of the land department have adopted and given effect to

the latter view. They adopted it before the present controversy arose or was thought of, and, except for a departure soon reconsidered and corrected, they have adhered to and followed it ever since.[1] Many outstanding titles are based upon it and much can be said in support of it. If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons.[2]

The case of *Edwards* v. *Bodkin*, 249 Fed. Rep. 562, and

[1] The instructions of June 6, 1905, 33 L. D. 607, contained the following:

"Seventh. When any entry for lands embraced within a withdrawal under the first form is canceled by reason of contest, or for any other reason, such lands become subject immediately to such withdrawal and can not, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry."

The regulations of May 18, 1916, § 29, 45 L. D. 385, 391, contained the following:

"Should the land embraced in the contested entry be within a first-form withdrawal at time of successful termination of the contest the preferred right may prove futile, for it can not be exercised as long as the land remains so withdrawn, but should the lands involved be restored to the public domain or a farm-unit plat be approved for the lands and announcement made that water is ready to be delivered, the preference right may be exercised at any time within 30 days from notice of the restoration or the establishment of farm units." And see *Wells* v. *Fisher*, 47 L. D. 288, for a statement and discussion of the departmental rulings.

[2] *Brown* v. *United States*, 113 U. S. 568, 571; *Webster* v. *Luther*, 163 U. S. 331, 342; *United States* v. *Hammers*, 221 U. S. 220, 228; *Logan* v. *Davis*, 233 U. S. 613, 627; *LaRoque* v. *United States*, 239 U. S. 62, 64.

265 Fed. Rep. 621, in which there was a decree of affirmance by this court, 255 U. S. 221, is cited as upholding a different view of the act. The opinions rendered by the Circuit Court of Appeals do indicate that it was disposed to think the words "thirty days from date of such notice" should be taken literally and strictly, but a careful reading of the opinions discloses that the decision was not put on that ground. As was rightly said by the Supreme Court of the State in the present case, "the decision there was not to the effect that the contestant was by mistake of law given the preference right." Indeed, that case did not call for any expression of opinion on the subject. The plaintiff there was the original homestead entryman and was insisting that his entry had been unlawfully canceled. If that claim was well taken, as was held, the cancelation did not give rise to any preferred right. Besides, the defendant there was not claiming under an entry based on a preferred right, but under entries made after he had relinquished the entry which he claimed was based thereon. Thus the observations of the Circuit Court of Appeals respecting preferred rights were *obiter dicta*, and, as the decree of affirmance in this court was put on other grounds, those observations are neither authoritative nor persuasive.

Here it is not questioned that the original or first entry—that of Rider—was lawfully canceled. McLaren recognized that that entry had been lawfully eliminated when he sought to initiate a claim to the land. He should also have recognized that Fleischer, by his contest, had brought about its elimination and was entitled, as a reward, to enter the land at any time within thirty days after it was restored to entry.

We conclude that the state courts rightly refused to disturb the construction which the officers of the land department had put on the act.

Judgment affirmed.

CULPEPPER *v.* OCHELTREE.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 202. Argued April 26, 27, 1921.—Decided June 1, 1921.

Decided upon the authority of *McLaren* v. *Fleischer*, *ante*, 477. 181 California, 788, affirmed.

THE case is stated in the opinion.

Mr. Samuel Herrick, with whom *Mr. Henry M. Willis* was on the brief, for petitioner.

Mr. Patrick H. Loughran for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This case is in all material respects like *McLaren* v. *Fleischer*, *ante*, 477. It was decided in the same way by the state courts and was argued with that case here. Therefore the opinion in that will suffice to dispose of this.

Judgment affirmed.